A Defense of Equitable Defenses

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I. INTRODUCTION

The merger of courts of law and equity has left an enduring legacy of debate about the survival of equitable doctrines in merged judicial systems. The debate usually focuses on two distinct—but related—issues: first, whether the particular equitable doctrine in fact survives as positive law after merger; and second, whether any policies served by the doctrine justify its survival on normative grounds in a merged legal system. The traditional requirement that damages be inadequate[1] for the equitable remedy of specific performance provides an excellent illustration of the positive and normative aspects of this debate. A leading remedies scholar has recently concluded, based on an exhaustive survey of modern cases, that inadequacy of damages is no longer a requirement for equitable relief and that invocation of the adequacy doctrine usually masks a different, more persuasive reason for the court's holding.[2] Another commentator has argued, almost as recently, that the adequacy doctrine remains important after merger as a means of assessing the strength of the plaintiff's interest in obtaining equitable relief. This interest is then balanced against possible interests of the defendant and of the legal system in limiting the plaintiff to damages as the remedy for breach.[3] The adequacy test has also sparked a lively normative debate, with some commentators criticizing the doctrine on grounds of fairness or efficiency,[4] and others arguing just as strenuously that the doctrine is fair or efficient.[5]

In addition to the adequacy requirement, a claim for specific performance traditionally had to overcome a series of defenses that did not exist at law (or were broader than comparable legal defenses) and that rested in the sound discretion of the Chancellor.[6] Like the adequacy doctrine, equitable defenses have

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1. *See* RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (1981) ("[s]pecific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party").

2. *See generally* Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 688 (1990).

3. *See* E. YORIO, CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS § 2.3, at 34; § 2.5, at 41 (1989). *See also* Yorio, *In Defense of Money Damages for Breach of Contract*, 82 COLUM. L. REV. 1365, 1370-76 (1982) (courts balance interests of the promisee, the promisor, and the legal system in adjudicating claims to specific relief).

4. *See generally* Linzer, *On the Amorality of Contract Remedies—Efficiency, Equity, and the Second Restatement*, 81 COLUM. L. REV. 111 (1981); Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979); Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341 (1984).

5. *See generally* Bishop, *The Choice of Remedy for Breach of Contract*, 14 J. LEGAL STUD. 299 (1985); Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978); Muris, *The Costs of Freely Granting Specific Performance*, 1982 DUKE L.J. 1053; Yorio, *supra* note 3.

6. *See* RESTATEMENT (SECOND) OF CONTRACTS § 364 (1981) (specific performance or an injunction may be denied on the grounds of unfairness resulting in hardship).

been criticized as anachronisms in a post-merger legal universe.[7] In contrast with the adequacy doctrine, however, equitable defenses have found few modern supporters.

This Article explores separate equitable defenses from both positive and normative perspectives and concludes that a powerful case can be made for their continued viability in a merged legal system.[8] Part II briefly describes the substantive content of equitable defenses and uses an example from a modern case to dramatize the troublesome issues raised by the existence of separate defenses to equitable relief. Part III discusses criticisms leveled by modern scholars against equitable defenses on grounds of morality and efficiency. As with the adequacy doctrine, one theme of the critics is that separate equitable defenses have not survived as positive law after the merger of law and equity.

Part IV points out that the noneconomic case against equitable defenses rests on two contradictory and extreme premises regarding the consequences of a successful equitable defense. Neither of these premises takes into account a real world in which the possible sequels (or preludes[9]) to an equitable defense are far more subtle and complex. Part V exposes other flaws in the case against separate defenses to equitable relief. Part VI shows that equitable defenses play a useful role in a merged legal system by mediating between the extremes of specific performance and rescission as outcomes in actions for breach of contract.

II. DEFINING THE PROBLEM

A party aggrieved by a breach of contract may seek equitable relief in the form of specific performance or an injunction to remedy the wrong. According to the Second Restatement of Contracts, a contract will not be specifically enforced if damages would be adequate,[10] if the terms of the contract are not sufficiently certain to devise an appropriate order,[11] or if the burden of enforcing or supervising a court order would exceed the benefit to be gained and the harm prevented by specific enforcement.[12] Even if the plaintiff overcomes these obstacles, a court has discretion to deny specific relief on the ground of an equitable defense.[13] Various factors may give rise to a successful equitable defense: improper conduct by the plaintiff in the formation of the contract;[14] unreasonable

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7. *See infra* text accompanying notes 43-46 (discussion of criticism that with the merger of law and equity separate equitable defenses are an anachronism).

8. Portions of this Article draw upon material treated in Chapter 4 of E. YORIO, *supra* note 3.

9. The existence of equitable defenses may affect pre-litigation bargaining between the parties to settle their dispute. *See infra* text accompanying notes 166-69. Thus, it is necessary to consider not only sequels to a successful equitable defense, but also preludes in the form of negotiated settlements.

10. RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (1981). *But see* Laycock, *supra* note 2 (inadequacy of damages is no longer a requirement for equitable relief).

11. RESTATEMENT (SECOND) OF CONTRACTS § 362 (1981).

12. *Id.* at § 366.

13. *See id.* at § 364 (specific performance or an injunction may be denied on the grounds of unfairness which would result in hardship).

14. *See, e.g.*, Perlmutter v. Bacas, 219 Md. 406, 149 A.2d 23 (1959) (misrepresentation by plaintiff as to access road); Eisenbeis v. Shillington, 349 Mo. 108, 159 S.W.2d 641 (1941) (misrepresentation by plaintiff's agent as to restrictive covenant).

delay by the plaintiff in instituting or pursuing an action for specific relief;[15] inadequacy of consideration;[16] impossibility;[17] mistake;[18] changed circumstances;[19] hardship on the defendant;[20] injury to third parties or the public;[21] or some combination of these circumstances.[22]

Some equitable defenses (such as inadequacy of consideration) have legal analogues (*i.e.*, unconscionability) that may also prevent the plaintiff from recovering damages.[23] But what distinguishes equitable defenses is that they sometimes operate to preclude specific relief while leaving the plaintiff free to pursue a claim to damages. This aspect of the doctrine of equitable defenses has provoked the severest criticism from modern commentators: why, they ask, does the legal system permit damages to be awarded for breach of a contract that the system refuses, for moral reasons, to enforce specifically?[24]

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15. *See, e.g.*, Miller v. Bloomberg, 126 Ill. App. 3d 332, 466 N.E.2d 1342 (1984) (delay by plaintiff in seeking to enforce order of specific performance).

16. *See, e.g.*, Gabrielson v. Hogan, 298 F. 722 (8th Cir. 1924) (specific performance denied against buyer of land because contract price was one-third more than value); Marks v. Gates, 154 F. 481 (9th Cir. 1907) (specific performance denied on ground that consideration of about $12,000 was grossly less than the value of defendant's return promise).

17. *See, e.g.*, Braaten v. Midwest Farm Shows, 360 N.W.2d 455 (Minn. Ct. App. 1985) (specific performance of partnership agreement could not be compelled because of each partner's right to terminate the partnership at will); Lewis v. City of Washington, 63 N.C. App. 552, 305 S.E.2d 752, *modified on other grounds*, 309 N.C. 818, 310 S.E.2d 610 (1983) (zoning restriction prohibited specific performance of contract terms).

18. *See, e.g.*, Nicholson v. Frawley, 112 Kan. 124, 210 P. 482 (1922) (buyer's mathematical error in computing price ground for denying specific performance); King v. Oxford, 282 S.C. 307, 318 S.E.2d 125 (Ct. App. 1984) (mistake as to net asset value ground for denying buyer's claim to specific performance).

19. *See, e.g.*, Bergstedt v. Bender, 222 S.W. 547 (Tex. Comm. App. 1920) (death of promisor soon after execution of the contract); Clay v. Landreth, 187 Va. 169, 45 S.E.2d 875 (1948) (specific performance denied because rezoning prevented defendant from building plant on subject property).

20. *See, e.g.*, 3615 Corp. v. New York Life Ins. Co., 717 F.2d 1236 (8th Cir. 1983) (specific performance will not be decreed if it would work disproportionate hardship on the defendant); Smith v. Meyers, 130 Md. 64, 99 A. 938 (1917) (cost to defendant of specific performance far in excess of benefit to the plaintiff); Patel v. Ali, [1984] 1 Ch. 283, 1 All E.R. 978 (illness, bankruptcy, and imprisonment in defendant's family after execution of contract make specific performance overly harsh).

21. *See, e.g.*, Rockhill Tennis Club v. Volker, 331 Mo. 947, 56 S.W.2d 9 (1932) (specific performance denied because of public interest in use of subject property as part of museum grounds); Hawks v. Sparks, 204 Va. 717, 133 S.E.2d 536 (1963) (specific performance denied to prevent petitioner from partitioning property to detriment of minors).

22. *See, e.g.*, Brooks v. Towson Realty Co., 223 Md. 61, 162 A.2d 431 (1960) (misunderstanding by defendant and inadequacy of consideration); Hoover v. Wright, 202 S.W.2d 83 (Mo. 1947) (incapacity of promisor and inadequacy); Public Water Supply Dist. v. Fowlkes, 407 S.W.2d 642 (Mo. Ct. App. 1966) (delay by plaintiff in bringing suit and mistake by defendant); In re Estate of Mihm, 345 Pa. Super. 1, 497 A.2d 612 (1985) (abuse of confidential relationship and inadequacy); McKinnon v. Benedict, 38 Wis. 2d 607, 157 N.W.2d 665 (1968) (superior bargaining position of plaintiff and hardship of injunction on defendant).

23. *See* E. FARNSWORTH, CONTRACTS §§ 4.28, 9.1-9.9 (1982) (analysis of legal defenses of unconscionability, mistake, impossibility, and frustration of purpose).

24. *See, e.g.*, Chafee, *Coming into Equity with Clean Hands* (pt. 2), 47 MICH. L. REV. 1065, 1096 (1949) [hereinafter Chafee II] (law and equity should not have different standards of morality); Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 495, 535-36 (1959) (separate equitable defenses produce double standard of morality and fail to alleviate hardship or discourage sharp bargaining if damages are awarded anyway); Frank & Endicott, *Defenses in Equity and "Legal Rights,"* 14 LA. L. REV. 380, 389-90 (1954) (separate equitable defenses are a myth that may lead to injustice); Newman, *The Renaissance of Good Faith in Contracting in American Law*, 54 CORNELL L. REV. 553, 557-58 (1969) (to award damages when specific relief is denied may be unfair to defendant); Schwartz, *supra* note 4, at 298-303 (separate equitable defenses produce confusion, uncertainty, and inefficiency); Comment, *Equitable Contract Remedies—Denial of Both Specific Performance and Rescission*, 32 MICH. L. REV. 518, 525 (1934) (differences in legal and equitable defenses produce double standard of morality and are senseless after merger of law and equity).

As an illustration of the strength of this argument, consider the facts of *Hilton v. Nelsen*.[25] The defendant agreed to sell his Minnesota farm to the plaintiff, a Missouri real estate investor, for $180,000. The contract provided that, in the case of default by the buyer, the seller's sole remedy would be retention of an earnest money deposit of $2,500; in the case of breach by the seller, the buyer would be entitled, if he chose, to specific performance. Shortly before the date set for closing, the seller repudiated and the buyer brought suit for specific performance, which was granted by the trial court.[26]

On appeal, the decision was reversed, and the case remanded for a determination of the buyer's damages at law.[27] In denying specific performance, the Supreme Court of Minnesota relied on the following facts: the contract was drafted by the buyer's attorney; it contained elements of unfairness or overreaching (the limitation imposed on the seller's remedy, the buyer's unilateral right to terminate for various reasons, and extremely generous payment terms); and the seller had not been represented by a lawyer at the signing and had misunderstood basic terms of the agreement.[28] Taken together, these circumstances constituted a defense to specific performance.[29]

The pattern of *Hilton v. Nelsen* recurs in many reported cases: the plaintiff asserts a claim for which specific performance would normally lie;[30] the defendant seeks to dismiss the claim on the ground of an equitable defense; and the court accepts the discretionary defense and denies the equitable remedy.[31] More interesting than this scenario is its sequel. Deprived of specific performance, the buyer may press an alternative claim for damages. Normally a promisee aggrieved by a breach of contract is entitled to expectation damages—that is, damages that put the promisee in the position in which she would have been had the promisor performed.[32] In the case of a breach by a seller of real estate, expectation damages would be measured by the difference between the market price of the property at the time of breach and the contract price,[33] a formula

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25. 283 N.W.2d 877 (Minn. 1979).

26. *Id.* at 880.

27. *Id.* at 883-84.

28. *Id.* at 881-83.

29. In denying specific performance, the court also relied on the buyer's investment motive, noting that damages were adequate because any other Minnesota farm land would serve as a comparable investment vehicle. *Id.* at 881. But the court strongly suggested that the presence of an investment motive would not in itself be sufficient to deny specific performance, *see id.* at 883, and expressly limited its holding to the narrow facts of the case. *Id.* But for the equitable defense, therefore, it seems likely that the buyer would have obtained specific performance.

30. A buyer of real estate normally is entitled to specific performance against a breaching seller. E. YORIO, *supra* note 3, § 10.2.1.

31. The court in *Hilton* did not place labels on the equitable defenses that barred the buyer from obtaining specific performance. The defense based on overreaching by the buyer might be categorized as "unfairness." *See id.* § 5.4.1. The defense based on the particular terms slanted in the buyer's favor might be labeled "inadequacy of consideration." *See id.* § 5.4.3.

32. *See* RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981) ("the injured party has a right to damages based on his expectation interest"); *id.* § 347 comment a (expectation damages "are intended to give him [i.e., the promisee] the benefit of bargain . . . .").

33. Assume for example, using the facts in *Hilton*, that the market value of the land was $250,000 on the date of breach. Had the seller performed, the buyer would have acquired land worth $250,000 for $180,000, producing a net monetary gain of $70,000. An award of damages measured by the difference ($70,000) between the market price ($250,000) and the contract price ($180,000) enables the buyer to pocket the same monetary gain.

endorsed by the court in *Hilton v. Nelsen*.[34] If, for example, the market value of the farm land was determined to be $250,000 on the date of breach, the buyer would recover $70,000 in expectation damages on remand.[35]

Outcomes such as this trouble critics of equitable defenses, who argue that the weakness of the plaintiff's case makes it unfair to require the defendant to pay the monetary equivalent of performance as damages.[36] Some of these critics also object that the legal system is applying a double standard of morality in adjudicating claims to equitable and legal relief.[37] Other critics argue that courts in fact ignore the distinction between equitable and legal defenses by using the same conduct or facts to rescind the contract and deny the plaintiff a recovery of money damages.[38] Even without rescinding the contract, the effect of denying specific relief may be to deprive the plaintiff of any effective remedy.[39] The resulting practical equivalence of equitable and legal defenses undermines the charge of a double standard of morality, but at the price of a conflict between legal theory and the practical consequences of separate equitable defenses. Part III explores more fully these and other arguments for abolishing separate defenses to equitable relief.

III. THE CASE AGAINST EQUITABLE DEFENSES

A. *Historical and Moral Criticisms*

In the early history of the office, the English Chancellor was almost always an ecclesiastic.[40] Partly as a result of his religious background, the Chancellor developed a method of adjudicating disputes on the basis of equitable or moral,

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Computing damages as of the date of breach prevents the buyer from recovering damages for any appreciation in the value of the land between the date of breach and the date of judgment. *See infra* text accompanying notes 97-101.

34. *See Hilton*, 283 N.W.2d at 884 n.5.

Other jurisdictions reject expectation as the measure of damages for breach by a seller of a real estate contract in certain cases, and instead limit the buyer's monetary recovery to restitution of any downpayment and reliance damages. *See* E. FARNSWORTH, *supra* note 23, at 839-40 (loss-of-bargain damages for breach of realty contract precluded in England and certain American states).

35. The amount that the buyer in *Hilton* would recover as damages on remand depends on the trier-of-fact's assessment of the market value of the property. If the trier-of-fact is unsympathetic to the buyer's claim, it might underassess the amount of damages. *See infra* text accompanying notes 146-60.

36. *See, e.g.*, Dawson, *supra* note 24, at 535-36 (equitable defenses fail to alleviate hardship or discourage sharp bargaining if damages are awarded anyway); Newman, *supra* note 24, at 557-58 (an award of damages may cause extreme hardship to the defendant); Comment, *supra* note 24, at 525-26 (legal remedies may be as harsh as specific performance).

37. Dawson, *supra* note 24, at 535-36 (equitable defenses involve double standard of morality); Comment, *supra* note 24, at 525 (double standard of morality makes no sense after the merger of law and equity).

38. *See* Chafee, *Coming into Equity with Clean Hands* (pt. 1), 47 MICH. L. REV. 877, 893 (1949) [hereinafter Chafee I] (equitable defense leads to rescission of the contract); Frank & Endicott, *supra* note 24, at 381 (empirical evidence that defeat in equity amounts to a total defeat); Newman, *supra* note 24, at 557-58 (after merger of law and equity, doctrine holding equitable plaintiff to a higher standard is no longer valid). *Cf.* Chafee II, *supra* note 24, at 1096 (impossible to believe that the same judges, sitting in equity and at law, have different senses of morality).

39. *See infra* text accompanying notes 58-61.

40. G. KEETON & L. SHERIDAN, EQUITY 3, 33 (3d ed. 1987); F. MAITLAND, EQUITY 2 (2d ed. 1936).

rather than strictly legal, principles.[41] As a court of conscience, the Chancellor entertained defenses to equitable relief that common law judges would not accept as defenses to claims for money damages in the courts of law.[42]

Two subsequent historical developments have led commentators to conclude that separate equitable defenses are now an anachronism.[43] First, Anglo-American Chancellors have long been secular, drawn generally from the same pool as common law judges.[44] Second, law and equity have merged in many jurisdictions, with the consequence that the very same judge decides both equitable and legal claims. For that judge to apply different standards of morality depending on the hat she wears seems indefensible.[45] If the judge permits damages to be recovered in lieu of specific relief, equitable defenses may fail in their purpose of alleviating hardship on the defendant or discouraging sharp tactics by the plaintiff.[46]

B. *Economic Criticisms*

In an important article, Professor Alan Schwartz has presented the most specific and sophisticated arguments from an economic perspective for abolishing separate equitable defenses.[47] He assesses the efficiency of these defenses in terms of two different criteria: first, their effect on competitive prices;[48] and second, their effect on the costs of judicial administration.[49] With respect to the first criterion, Schwartz argues that a defense that leads to more competitive prices is efficient; a defense that leads to higher prices is inefficient.[50] Schwartz concludes that certain procedural defenses (such as misrepresentation) may be justifiable because they improve the bargaining process and lead to more competitive prices.[51] Defenses that are based solely on substantive unfairness with-

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41. *See* E. FARNSWORTH, *supra* note 23, at 821 (Chancellor was expected to act according to conscience); G. KEETON & L. SHERIDAN, *supra* note 40, at 3 (equity founded on reason and conscience); F. MAITLAND, *supra* note 40, at 8 (Chancellors did not consider themselves bound by precedent); J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 35 (5th ed. S. Symons 1941) (principles upon which Chancellor's decisions were based were honesty, equity, and conscience).

During the sixteenth century, equitable principles began to become fixed as a body of rules. *See* P. BAKER & P. LANGAN, SNELL'S PRINCIPLES OF EQUITY 9 (28th ed. 1982); F. MAITLAND, *supra* note 40, at 9.

42. *See* E. FARNSWORTH, *supra* note 23, at 837 (discretionary defenses developed from historical origin of equity as a court of conscience).

43. *See* Chafee I, *supra* note 38, at 895 (with the merger of law and equity, issue should be the same with respect to legal and equitable relief); Dawson, *supra* note 24, at 536 (double standard of morality has survived long after secularization of the role of the Chancellor); Comment, *supra* note 24, at 525 (double standard of morality makes no sense after merger of law and equity).

44. *See* G. KEETON & L. SHERIDAN, *supra* note 40, at 3 ("[a]t the close of the middle ages the Chancellor ceased to be a cleric and by the seventeenth century he was almost invariably a lawyer"); F. MAITLAND, *supra* note 40, at 9 ("[i]n the second half of the sixteenth century . . . [t]he day for ecclesiastical Chancellors is passing away"); Dawson, *supra* note 24, at 536 (the Chancellors have "long . . . laid aside their ecclesiastical robes").

45. *See* Z. CHAFEE, SOME PROBLEMS OF EQUITY 28 (1950) ("Why should the same judges be very moral in a specific performance suit and brutally mathematical in a damage suit?").

46. Dawson, *supra* note 24, at 535-36. *See also* Newman, *supra* note 24, at 557-58 (award of damages may impose extreme hardship on the defendant).

47. Schwartz, *supra* note 4, at 298-303.

48. *Id.* at 300.

49. *Id.* at 300, 303.

50. *Id.* at 300.

51. *Id.*

out any evidence of procedural irregularity (such as inadequacy of consideration) are inefficient because they deter buyers from seeking out good deals.[52] As comparison-shopping by buyers decreases, sellers have less reason to reduce prices to a competitive level. Because of their effect in increasing prices, Schwartz concludes that substantive equitable defenses ought to be abolished.[53]

Although certain process-based defenses to equitable relief have a positive economic effect by keeping prices lower, Schwartz faults the legal system for making these defenses broader than their analogues at law.[54] Differences between legal and equitable defenses generate confusion and make the legal outcome unpredictable.[55] As a consequence, defendants frequently assert equitable defenses and courts are forced to spend greater time and resources in adjudicating contractual disputes.[56] Schwartz also argues that the existence of separate equitable defenses causes sharp discontinuities in outcome without normative justification: when damages are provable, the plaintiff who is denied equitable relief can enforce the contract at law; when damages are uncertain, the plaintiff may be denied any remedy for the breach.[57]

C. *The "Death" of Separate Equitable Defenses*

In a 1954 article, Frank and Endicott concluded that a plaintiff who is denied relief in equity on the ground of an equitable defense rarely succeeds in recovering money damages at law.[58] The authors offered several explanations for the inability of plaintiffs to obtain monetary relief: the existence of an identical legal defense; a procedural bar to a legal claim (such as the Statute of Limitations); or a practical obstacle to recovering damages (such as the defendant's insolvency).[59] A 1969 article addressed the same issue by focusing primarily on reported cases in merged legal systems.[60] The author's findings suggest that the trend toward practical equivalence of equitable and legal defenses may have accelerated as a result of the merger of law and equity: only two cases were found in which the plaintiff recovered damages after equitable relief was denied.[61]

Taken together, these articles announce what appears to be the death of separate equitable defenses.[62] Frank and Endicott argue that divergence between the theory and reality of equitable defenses misleads courts and litigants and creates the risk of legal error when a judge denies equitable relief in the

52. *Id.*
53. *Id.*
54. *Id.* at 300-01.
55. *Id.* at 301.
56. *Id.* at 300. *Cf.* Laycock, *supra* note 2, at 769 (survival in theory of irreparable injury rule forces litigants and courts to expend additional resources).
57. Schwartz, *supra* note 4, at 299-300.
58. Frank & Endicott, *supra* note 24, at 389-90.
59. *Id.* at 382-88.
60. Newman, *supra* note 24.
61. *Id.* at 559.
62. Frank & Endicott, *supra* note 24, at 389 (equitable defenses are a myth); Newman, *supra* note 24, at 557-58 (equitable defenses no longer represent true state of the law).

erroneous belief that damages will be awarded instead.[63] Professor Douglas Laycock argues in a related context that the survival in theory of an equitable doctrine that is practically moribund needlessly consumes time and resources as litigants and courts struggle to find reasons not to apply the doctrine to the facts of the particular case.[64] If separate equitable defenses are in fact dead, these arguments constitute a powerful case for changing legal theory to dispel the illusion that a plaintiff may recover compensatory damages after dismissal of her equitable claim.[65]

D. *Summary*

Critics of equitable defenses on historical or moral grounds would change what they perceive to be the positive law by subjecting claims to damages to the same standards of morality as claims to equitable relief. Legal economists also urge reform of the positive law to make equitable and legal defenses equivalent, but primarily by narrowing (or eliminating) defenses to equitable relief. Still other critics believe that equitable and legal defenses are already practically equivalent, but fault legal theory for lagging behind the positive law. All the critics agree on one point: legal and equitable defenses *ought* to be identical, whether or not they already are.

IV. Sequels (or Preludes) to an Equitable Defense

Two antithetical and extreme premises underlie the noneconomic case against separate equitable defenses. One set of arguments assumes that equitable defenses remain broader than their legal counterparts despite the merger of law and equity and that a plaintiff denied specific relief on the ground of an equitable defense will recover the monetary equivalent of performance as damages.[66] Another set of arguments rests on claims that equitable and legal defenses are in practice identical in merged judicial systems and that a plaintiff denied specific relief will fail to obtain any other remedy for the breach.[67]

Both of these premises cannot simultaneously be true. In fact, neither is a complete picture of the consequences to litigants of the existence of separate defenses to equitable relief. Between the extremes of full expectation damages for the breach and rescission of the contract lie a vast array of intermediate outcomes. A survey of possible sequels (or preludes) to a successful equitable defense will expose flaws in the premises underlying the noneconomic case against separate equitable defenses.[68]

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63. Frank & Endicott, *supra* note 24, at 389.

64. Laycock, *supra* note 2, at 769 (irreparable injury rule generates costs in trying to fit the case within the numerous exceptions that have swallowed the rule).

65. *See* Frank & Endicott, *supra* note 24, at 389-90. *Cf.* Laycock, *supra* note 2, at 768-71 (courts should eschew the covert tool of the irreparable injury rule in favor of an open discussion of the reasons for denying equitable relief).

66. *See supra* text accompanying notes 45-46.

67. *See supra* text accompanying notes 58-65.

68. The economic case against separate equitable defenses rests on different—but also flawed—premises. *See infra* text accompanying notes 187-94 (economic arguments for abolishing separate equitable defenses ignore the

A. *Alternatives to Expectation Damages*

Although expectation is the normal measure of damages for breach of contract,[69] the Second Restatement of Contracts recognizes two other possible measures of recovery against the breaching party: reliance damages and restitution.[70] Reliance damages are designed to put the injured party in the same position as if the contract had not been made by reimbursing for any loss caused by reliance on the contract.[71] Restitution is designed to prevent unjust enrichment by requiring the party in breach to restore any benefit conferred by the injured party in part performance or reliance on the contract.[72]

A simple hypothetical will help to illustrate the differences among these remedies. In a detailed written agreement, *S* agrees to sell a parcel of land to *B* for $200,000. Pursuant to the agreement, *B* makes an immediate downpayment of $20,000. The agreement is contingent upon *B*'s obtaining bank financing for seventy-five percent of the purchase price at an interest rate of ten percent or lower and requires that *B* make good-faith efforts to obtain a mortgage. In reliance on the agreement, *B* pays a standard fee of $1000 for a mortgage application. After the bank gives *B* a mortgage commitment, *S* repudiates the agreement. *B* brings suit requesting specific performance or monetary relief for *S*'s refusal to convey the land; *S* answers by alleging circumstances that might constitute an equitable defense.

This scenario gives rise to five possible remedies: 1) specific performance; 2) expectation damages computed to give *B* the benefit of the bargain;[73] 3) restitution of $20,000, the amount of the downpayment made by *B* to *S* pursuant to the agreement; 4) reliance damages of $1000, the expense incurred by *B* in applying for a mortgage in reliance on the contract; or, 5) both restitution of $20,000 and reliance damages of $1000. If a court decides to deny specific performance on the ground of an equitable defense, it need not award *B* benefit-of-the-bargain damages, but may instead limit *B*'s recovery to restitution, to reliance damages, or to both.[74] Depending on the facts of the particular case, a

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benefit of having a more responsive legal system and posit unrealistic behavior by buyers in response to equitable defenses).

69. *See supra* text accompanying note 32.

70. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 349, 373(1) (1981). The Restatement also authorizes the recovery of the amount provided in a valid liquidated damages clause. *See id.* § 356. For an overview of contract remedies, see Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145 (1970).

71. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 344(b), 349 (1981). The classic analysis of reliance damages is Fuller & Perdue, *The Reliance Interest in Contract Damages* (pts. 1 & 2), 46 YALE L.J. 52 & 373 (1936 & 1937).

72. *See* RESTATEMENT (SECOND) OF CONTRACTS § 344(c), 373(1) (1981). For further analysis of restitution in the contractual context, see Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339 (1985); Perillo, *Restitution in the Second Restatement of Contracts*, 81 COLUM. L. REV. 37 (1981); Perillo, *Restitution in a Contractual Context*, 73 COLUM. L. REV. 1208 (1973).

73. Assuming that *B* establishes that the market value of the land is $275,000, she has a claim to a recovery of $95,000. That amount gives her the benefit of the bargain: she would have realized a net monetary gain of $95,000 if *S* had performed by conveying land worth $275,000 for the balance ($180,000) of the purchase price. *See* E. FARNSWORTH, *supra* note 23, at 844-48 (discussion of general measure of expectation damages).

74. *See, e.g.*, Banaghan v. Malaney, 200 Mass. 46, 49-50, 85 N.E. 839, 840 (1908) (nonbreaching party entitled to reliance damages for "losses . . . sustained"); Buckley v. Patterson, 39 Minn. 250, 39 N.W. 490 (1888) (trial court should award restitution, not benefit-of-the-bargain damages, after denial of specific performance); Lewis v. City of Washington, 309 N.C. 818, 310 S.E.2d 610, *modifying* 63 N.C. App. 552, 305 S.E.2d 752

court may have other remedial alternatives.[75] If, for example, the contract in dispute contains a liquidated damages provision, damages may be awarded in the stipulated amount.[76]

B. *Limitations on Damages*

After denying specific performance on the ground of an equitable defense, a court may decide that the facts entitle the plaintiff to expectation damages rather than some lesser remedy (such as reliance damages or restitution). Though designed in theory to give the plaintiff the benefit of the bargain,[77] expectation damages sometimes fall short of the monetary equivalent of performance because claims to damages must satisfy three requirements: mitigation, foreseeability, and certainty.[78] Of these requirements, mitigation and certainty recur most often as practical obstacles to plaintiffs seeking damages after specific performance has been denied.[79]

1. *Mitigation of Damages*

The Second Restatement of Contracts provides that "damages are not recoverable for loss that the injured party could have avoided without undue risk, burden, or humiliation."[80] This rule, which is known as the doctrine of mitigation of damages, has two branches. Under the negative branch, the aggrieved party is generally expected to cease performance upon breach or repudiation in order to avoid further costs.[81] Under the positive branch, the injured party is expected in certain circumstances to take affirmative steps to reduce the loss

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(1983) (plaintiff entitled to restitution of rental payments after denial of specific performance of lease); King v. Oxford, 282 S.C. 307, 315, 318 S.E.2d 125, 130 (Ct. App. 1984) (buyer of corporate stock denied specific performance, but entitled to recover any nonspeculative reliance damages).

If the plaintiff passed up another opportunity in reliance on the contract with the defendant, reliance damages theoretically include any profit lost on the foregone opportunity. *See* Fuller & Perdue, *supra* note 71, at 60-61.

75. *See, e.g.*, Kleinberg v. Ratett, 252 N.Y. 236, 169 N.E. 289 (1929) (seller denied specific performance, but allowed to retain downpayment made by buyer).

76. *See* Sumner v. Bankhead, 119 S.C. 78, 111 S.E. 891 (1922) (seller allowed to retain downpayment pursuant to liquidated damages clause after denial of specific performance on ground of equitable defense).

77. *See supra* text accompanying note 32.

78. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 350-52 (1981).

79. The discussion in the text is limited to the mitigation and certainty requirements because the foreseeability doctrine rarely appears in the reported cases as a practical limitation on damages after specific performance is denied. At the risk of some oversimplication, the foreseeability requirement may be summarized as absolving the breaching party of liability for damages that were not reasonably foreseeable at the time the contract was consummated. *See id.* § 351. It is possible, in theory, that this requirement may have a serious negative effect on a plaintiff's claim to damages after specific performance has been denied on the ground of an equitable defense. Suppose, for example, that a buyer agrees to pay $250,000 for a parcel of real estate which she expects to develop in an unspecified way and from which she hopes to make a net profit of $100,000. If the seller repudiates and specific performance is denied on the ground of an equitable defense, the buyer may seek to be compensated for the loss of net profit caused by the breach. If the profit was unforeseeable at the time of contract, the buyer may be precluded from a recovery in that amount by the foreseeability doctrine.

80. RESTATEMENT (SECOND) OF CONTRACTS § 350(1) (1981).

81. *See* Rockingham County v. Luten Bridge Co., 35 F.2d 301 (4th Cir. 1929) (contractor denied costs incurred in constructing a bridge after repudiation by government entity); Clark v. Marsiglia, 1 Denio 317 (N.Y. 1845) (restorer denied damages for expenses incurred after owner of painting repudiated contract); RESTATEMENT (SECOND) OF CONTRACTS § 350 comment a (1981) (nonbreaching party "is ordinarily expected to stop his own performance to avoid further expenditure").

caused by a breach.[82] If the injured party fails to satisfy either branch of the doctrine, damages are reduced to the extent that the loss could have been avoided.[83]

The positive branch of the mitigation doctrine operates as the implicit foundation of many of the standard formulas for computing contract damages. In the case of fungible goods, for example, one measure of damages against a seller in breach is the difference between the market price on the date that the buyer learned of the breach and the contract price.[84] By depriving the buyer of damages for any subsequent price increase, this formula betrays an implicit premise that the buyer is expected to mitigate by covering in the market upon learning of the breach.[85] The effect of the formula—and of the mitigation doctrine in general—is to place the risk of subsequent market fluctuations on the injured party.[86]

A party seeking specific performance usually will not take the steps necessary to satisfy the positive branch of the mitigation doctrine. Because she expects the party in breach ultimately to perform, she has no reason to engage a market replacement. Moreover, her claim to specific performance generally depends on inadequacy of damages (at least compared to the equitable remedy).[87] Often the reason damages would be inadequate is the lack of an available substitute on the market.[88] What establishes a prima facie claim to specific performance (irreplaceability on the market) makes it difficult, if not impossible, for the injured party to take affirmative steps to reduce the loss caused by the breach.[89]

With this background, it is possible to understand the relationship between the mitigation doctrine and equitable defenses. If specific performance is denied

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82. *See* Jameson v. Board of Education, 78 W. Va. 612, 89 S.E. 255 (1916) (wrongfully discharged employee expected to accept comparable service to minimize the loss in earnings caused by breach); RESTATEMENT (SECOND) OF CONTRACTS § 350 comment b (1981) (injured party "expected to take such affirmative steps as are appropriate" to avoid loss); *id.* § 350, illustration 5 (buyer denied damages that could have been prevented by acquiring substitute machine); *id.* § 350, illustration 6 (farmer denied damages for loss of a crop preventable by engagement of replacement for breaching farmhand).

83. *See* RESTATEMENT (SECOND) OF CONTRACTS § 350 comment b (1981) (amount of avoidable loss is deducted from the amount otherwise recoverable as damages).

84. *See* U.C.C. § 2-713(1). If the buyer has actually covered by purchasing substitute goods, damages are measured by difference between the cost of cover and the contract price. *Id.* §§ 2-711(1)(a); 2-712(2). *See also* Gabrielson v. Hogan, 298 F. 722 (8th Cir. 1924) (contract price/market price differential determined on the date of breach of real estate contract).

85. *See* Weathersby v. Gore, 556 F.2d 1247 (5th Cir. 1977) (buyer can protect herself by acquiring good in the market at the time of breach).

86. This effect is demonstrated by the leading nineteenth century case enunciating the date-of-breach formula for computing damages. *See* Gainsford v. Carroll, 2 B. & C. 624, 107 Eng. Rep. 516 (K.B. 1828). Upon default by a seller of bacon, the trial court awarded damages based on the price of bacon at the time of judgment. On appeal, the court reversed, holding that damages should be assessed at the time of breach, when the price of bacon was lower, because the buyer was expected to mitigate at that time.

87. *See supra* text accompanying note 10.

88. *See* RESTATEMENT (SECOND) OF CONTRACTS § 360(b) (1981) (difficulty of obtaining a substitute is a "significant" factor in determining whether damages would be adequate); Laycock, *supra* note 2, at 691, 703 (modern test of inadequacy of damages is whether the plaintiff can use them to replace the specific thing he has lost).

89. *See* E. YORIO, *supra* note 3, § 8.2.3.1 (mitigation doctrine and specific performance rest on antithetical premises regarding the availability of a substitute).

on the ground of an equitable defense, a court must determine the amount of damages to award in lieu of the equitable remedy. Rarely will the mitigation doctrine play an express role in this determination because the injured party usually has convincing reasons for her failure to mitigate.[90] But formulas for computing damages that derive from the mitigation principle may affect the damages award indirectly depending on the date selected by the court for assessing the injured party's loss.

Suppose that a seller agrees to sell her home for $100,000. On the date set by the contract, when the value of the home is $110,000, the seller refuses to convey a deed to the property. In answer to the buyer's suit for specific performance, the seller proves that she became seriously ill after the execution of the contract and that she is now dependent on relatives and neighbors to care for her children and maintain her home. She argues that an order of specific performance, by forcing her to move, would produce extreme hardship for her and her family. Although these facts make an appealing case for denying the equitable remedy, damages may be awarded in an amount sufficient, when added to the contract price, to enable the buyer to acquire a comparable home on the market.[91] If the value of the home has risen to $125,000 by the date of judgment, the buyer would need $25,000 in damages to replace what the seller refuses to convey, however understandably, under the contract.[92]

Notice that this outcome involves a suspension of the normal mitigation principle because damages are computed as of the date of judgment rather than the date of breach. The effect is to shift the risk of interim appreciation from the injured party, on whom the mitigation rule normally places the risk,[93] to the party in breach. Shifting this risk may be justified on the ground that the injured party could not be expected to cover on the date of breach by buying another home because she had a powerful claim to specific performance, which was denied for reasons and circumstances beyond her control.[94]

The date-of-judgment formula will not always benefit the injured party. Suppose, for example, that the market price of the home declines from $110,000 to $104,000 between the date of breach and the date of judgment. Computed on the date of breach, the buyer's damages are $10,000; computed

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90. *See supra* text accompanying notes 86-89.

91. The hypothetical in the text is based on the facts of Patel v. Ali, [1984] 1 Ch. 283, 1 All E.R. 978, in which the court denied specific performance of a promise to sell a home for £24,000 on the ground of hardship and changed circumstances, but ordered the seller to deposit £10,000 as security for buyer's damages. Although the opinion does not indicate the date on which damages were to be computed, requiring a deposit of £10,000 on a contract price of £24,000 suggests that the court wanted to ensure that the buyer would be able to acquire a substitute home in the market.

92. The buyer may take the $25,000 in damages, add it to the contract price of $100,000, and acquire a comparable home for the market price of $125,000.

93. *See supra* text accompanying notes 85-86.

94. *See* Asamera Oil Corp. v. Sea Oil & Gen. Corp., 1 S.C.R. 633, 668, 89 D.L.R.3d 1, 26 (1979) (buyer may be relieved from consequences of failure to mitigate if there was a "fair, real and substantial" basis for specific performance). *See also* Waddams, *The Date for the Assessment of Damages*, 97 L.Q.R. 445, 450 (1981) (damages may be computed as of the date of judgment where buyer has a justifiable claim to specific performance).

on the date of judgment, damages are $4000.[95] Whenever the property at issue declines in value, the effect of the date-of-judgment formula is to reduce the injured party's recovery by the amount of the depreciation. Using the date-of-judgment formula is proper, however, because it results in an award that is sufficient to accomplish the objective of enabling the buyer on the judgment date to purchase a substitute for the home she would have acquired but for the equitable defense to specific performance.[96]

A court is likely to take a different view of the appropriate date for computing damages when the reason for denying specific performance is the injured party's own delay in instituting or pursuing a claim to specific performance.[97] Particularly in the case of speculative property, delay by the buyer may be an attempt to obtain a risk-free hedge.[98] If the property declines in value by the date of trial, the buyer will seek damages measured by the difference between the market price on the date of breach and the contract price; if the property increases in value, the buyer will seek specific performance.[99] When a buyer awaits the turn of events and seeks specific performance only after a rise in value, a court may deny the equitable remedy[100] and may limit damages to the

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95. The difference between the market and contract price is $10,000 on the date of breach; that difference is $4000 on the date of judgment.

96. The buyer may take the $4000 recovery, add it to the contract price of $100,000, and purchase a substitute at the market price of $104,000.

It is possible in certain cases that using the date-of-judgment formula will deprive the buyer of *any* recovery for the breach. Suppose in the hypothetical in the text that the property declines in value to $90,000 by the date of judgment. Because $90,000 is less than the contract price of $100,000, the buyer recovers no damages under a date-of-judgment formula. Of course, when the property declines in value below the contract price, it is unlikely that the seller would breach. Breach is conceivable, however, if the seller has personal reasons for refusing to convey the property. *See supra* text accompanying notes 90-92. Denying the buyer any recovery under those circumstances is not unfair because she can acquire a comparable substitute home for less than the contract price.

97. The equitable defense premised on unreasonable delay by the plaintiff is often referred to as "laches." *See, e.g.*, E. YORIO, *supra* note 3, § 5.7.3. One of the usual requirements for laches is prejudice to the defendant. *See id.* § 5.7.1. Arguably, a seller suffers no prejudice from a rise in the value of property beyond having to fulfill her bargain. *See id.* § 5.7.3. During the period of the buyer's delay, however, the seller is in an uncertain position, at risk of market fluctuation in the value of the property and unsure whether to take advantage of other opportunities with respect to the property. R. SHARPE, INJUNCTIONS AND SPECIFIC PERFORMANCE 43 (1983). This may be sufficient prejudice to constitute laches. *See* E. YORIO, *supra* note 3, § 5.7.3. Regardless of whether the prejudice requirement for laches has been met, courts may deny specific performance if the buyer's delay in seeking specific performance was designed to take advantage of market fluctuation. *See infra* sources cited in note 100.

98. *See* R. SHARPE, *supra* note 97, at 43 (delay in seeking specific performance may give buyer risk-free period of speculation at seller's expense).

99. The point in the text may be illustrated mathematically by assuming that the contract price is $100,000 and the market value on the date of breach is $125,000. If the market price declines to $110,000, the buyer will opt for damages computed as of the date of breach ($25,000) instead of specific performance because the latter leaves the buyer with a net gain of only $10,000 (the difference between the market value on the date of judgment and the contract price). If the market price increases to $145,000, the buyer will seek specific performance because the equitable remedy enables the buyer to pocket a net gain of $45,000 (the difference between the market value on the date of judgment and the contract price).

100. *See, e.g.*, Miller v. Bloomberg, 126 Ill. App. 3d 332, 466 N.E.2d 1342 (1984) (specific performance denied where property had appreciated during delay of more than 2 ½ years); Hawks v. Sparks, 204 Va. 717, 133 S.E.2d 536 (1963) (specific performance denied where property had appreciated during five-year delay).

Before denying specific relief, some courts require evidence that the delay was in bad faith and designed to speculate on a rise in value. *See, e.g.*, Hochard v. Deiter, 219 Kan. 738, 742, 549 P.2d 970, 975 (1976) (specific performance granted, despite rise in value, because there was no evidence that the buyers delayed to speculate on rise in value).

difference between the market price on the date of breach and the contract price, thereby depriving the buyer of the interim appreciation.[101]

The date-of-breach formula for computing damages may also be used when specific relief is denied because of some fault on the plaintiff's part other than delay. In *Hilton v. Nelsen*,[102] the court reversed a judgment ordering specific performance of a contract to sell farm land on the ground (among others) of overreaching by the buyer,[103] but remanded the case for a determination of the buyer's damages.[104] Without so holding, the court endorsed a formula for computing damages as of the date of breach[105] that would deprive the buyer of any appreciation in the value of the property[106] during the period of more than three years between the date of breach (May 1, 1976) and the date of judgment (June 15, 1979).[107]

A principle akin to mitigation of damages surfaces, with a somewhat similar effect in reducing the amount of damages awarded, in a number of cases in

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101. Assume that the contract price is $100,000 and the property increases in value from $125,000 to $145,000 from the date of breach and to the date of judgment. Damages computed as of the date of breach are $25,000. Specific performance would enable the buyer to pocket a net gain of $45,000. *See supra* note 99. By denying specific performance and computing damages as of the date of breach, the court reduces the buyer's net gain by $20,000, the amount of the interim appreciation.

An alternative method of foiling attempts by buyers to hedge would be to compute damages as of the date of judgment in *all* cases in which specific performance would normally be available as a remedy for breach. This formula would strip the buyer of the option of recovering damages computed as of the date of breach if the property declines in value. The effect of a date-of-judgment formula is to place the risk of any change in the value of the property on the seller. *See supra* text accompanying notes 93-94.

Of course, a buyer may prefer to cover immediately rather than await specific performance or damages computed as of the date of judgment. If the buyer has effected reasonable cover, it is arguable that damages should be measured by the difference between the cover and contract price. Allowing the buyer to recover damages measured by the cover/contract price differential creates a risk, however, that a buyer who has covered may have a hedge. If the property later increases in value, she will seek specific performance rather than the cover/contract price differential; if the property declines in value, she will seek damages measured by the cover/contract price differential. *See supra* text accompanying notes 98-99.

One commentator has suggested that the seller should be allowed to use cover by the buyer as a defense to specific performance and that the buyer should be limited to damages measured by the cover/contract price differential. *See* Waddams, *supra* note 94, at 453. Otherwise, the buyer may be doubly protected against a rise in real estate values: she gets the benefit of appreciation on the substitute property and on the property in dispute (if specific performance is granted or if damages are computed under a date-of-judgment formula). *See id.* A countervailing consideration in favor of granting specific performance is that it may be difficult to determine whether the assets used to acquire the substitute property are traceable to assets freed up by the seller's breach. The purchase of what appears to be a substitute may be an independent investment. *See id.*

102. 283 N.W.2d 877 (Minn. 1979).

103. For further analysis of this case, *see supra* text accompanying notes 25-35 and *infra* notes 158-60, 290-300.

104. *Hilton*, 283 N.W.2d at 883-84.

105. *See id.* at 884 n.5.

106. The effect of the date-of-breach formula in depriving the buyer of interim appreciation may be illustrated mathematically by assuming that the contract price for the farm land was $180,000, the value on the date of breach was $250,000, and the value on the date of judgment was $300,000. Had specific performance been ordered, the purchaser would have obtained property worth $300,000 for $180,000, producing a net gain of $120,000. Damages computed as of the date of breach in accordance with the formula endorsed by the court would be $70,000, which is $50,000 less than the net gain to the buyer from performance. The difference is attributable to the buyer's loss of the interim appreciation of $50,000.

107. Using the date-of-breach formula would have the opposite effect of *increasing* the buyer's recovery if the property declined in value. *See supra* note 99. However, the existence of high inflation during the period at issue in *Hilton* (the late 1970s) makes it almost certain that the date-of-breach formula would result in a lower recovery than the date-of-judgment formula.

which specific performance is denied on the basis of an express cost-benefit analysis.[108] Typically, the plaintiff presents a prima facie claim to specific performance by showing that breach of the contract would injure an interest of the plaintiff in real property.[109] The defendant answers by showing that the cost of performance in accord with the terms of the agreement exceeds the benefit to the plaintiff. Accepting this fact as defense to specific performance, a court may simultaneously award damages measured by the harm suffered by the plaintiff as a result of the breach.[110] The combined effect of denying specific performance and computing damages by this formula is to absolve the defendant of liability for the excess of the cost of performance over the amount of the plaintiff's own loss. Although this outcome is technically not an application of the mitigation doctrine,[111] the policy of minimizing losses that underlies the doctrine[112] explains why courts measure damages by the harm to the plaintiff rather than order the defendant to perform specifically or to pay the monetary equivalent of performance as damages.[113]

2. *The Certainty Doctrine*

The Second Restatement of Contracts provides that "[d]amages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty."[114] To understand the relationship between this provision (known as the certainty doctrine) and equitable defenses, it is necessary to bear in mind that a plaintiff seeking specific performance or an injunction usually has to establish that damages would be a less adequate remedy than equitable relief.[115] A significant factor in establishing relative inade-

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108. *See, e.g.*, Sanitary Dist. of Chicago v. Martin, 227 Ill. 260, 81 N.E. 417 (1907); Smith v. Meyers, 130 Md. 64, 99 A. 938 (1917). *Cf.* E. YORIO, *supra* note 3, § 2.3 (availability of specific performance depends on implicit cost-benefit analysis).

109. *See* E. YORIO, *supra* note 3, § 10.2.1 (virtually all interests in real estate protected by equitable remedies).

110. *See, e.g.*, Sanitary Dist. of Chicago v. Martin, 227 Ill. 260, 81 N.E. 417 (1907); Smith v. Meyers, 130 Md. 64, 99 A. 938 (1917). *See also* Webb v. Direct London & Portsmouth Ry., 1 DeG. M. & G. 522, 42 Eng. Rep. 654 (1852) (railroad's promise to pay £4500 for land on which to build rail line not subject to specific performance, but plaintiff entitled to damages in the amount of loss caused by nonperformance).

111. The principle in the text absolves the defendant of an obligation to perform (or to pay damages measured by the cost of performance) when the plaintiff's loss is less than the cost of performance. The mitigation doctrine requires that damages be reduced by the amount of loss that the plaintiff could have avoided.

112. *See supra* text accompanying notes 80-83.

113. A similar issue arises in construction or repair cases in which the plaintiff seeks the cost of completion or repair as damages, and the defendant argues that damages should be limited to the decline in market value. *See generally* Yorio, *supra* note 3, at 1388-424. To give the plaintiff the benefit of the bargain, damages should be measured by the cost of completion or repair in the normal case. *See id.* at 1402-05. Particular facts may justify limiting the plaintiff's recovery to the decline in value or to some other amount less than the cost of completion or repair. *See id.* at 1408-24.

Cases that award less than the cost of completion or repair in response to particular facts document the flexibility that underlies our system of contract remedies. *See id.* at 1405-24. Whether the choice is between the equitable remedy of specific performance and the legal remedy of damages or between two different measures of damages, courts ought to respond to the particular circumstances of the dispute in devising a remedy for the breach. *See infra* text accompanying notes 215-23.

114. RESTATEMENT (SECOND) OF CONTRACTS § 352 (1981).

115. *See supra* text accompanying note 10.

quacy of damages is the difficulty of proving them with reasonable certainty.[116] If this factor establishes a prima facie claim to specific performance or an injunction, but specific relief is ultimately denied on the ground of an equitable defense, the plaintiff faces the prospect that damages may also be denied (or limited) by virtue of the certainty doctrine.[117]

Consider, for example, the facts of *McKinnon v. Benedict*.[118] Benedict agreed to a covenant restricting the ways in which he could develop real estate that he acquired through an interest-free loan provided by McKinnon, a neighboring landowner. McKinnon later sought to enjoin Benedict from developing the property in violation of the covenant, arguing that development would destroy the character of the neighborhood and spoil his view over Benedict's land. In light of the difficulty of quantifying McKinnon's esthetic and subjective loss, the case for issuing an injunction was particularly strong.[119]

The court decided otherwise, relying on a set of circumstances that together were held to constitute a defense to injunctive relief: inadequacy of consideration; hardship on Benedict if development of his property were enjoined; and wide disparity in the business experience of the parties.[120] Denied an injunction, McKinnon would have to overcome the certainty doctrine in order to recover damages for his esthetic loss. The court might have allowed the trier-of-fact to set damages based on McKinnon's testimony that the value of his property would decline by $50,000 if Benedict proceeded with development.[121] But McKinnon's own real estate expert was unable to testify as to the amount of the depreciation,[122] making it plausible that recovery for the loss would be precluded by the certainty doctrine.[123] This outcome would be difficult to defend on normative grounds if otherwise similarly-situated plaintiffs were able to obtain monetary compensation for their losses simply because damages happen to be easy to prove.[124]

To test the validity of this criticism, a brief review of the origin and current status of the certainty doctrine is essential. The doctrine originated as a judicial device to control the discretion of juries in awarding damages for breach of

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116. *See* RESTATEMENT (SECOND) OF CONTRACTS § 360(a) (1981).

117. *Cf.* Schwartz, *supra* note 4, at 298-99 (efficacy of legal claim depends on ability of plaintiff to prove damages).

118. 38 Wis. 2d 607, 157 N.W.2d 665 (1968).

119. *See supra* text accompanying notes 115-16.

120. *See McKinnon*, 38 Wis. 2d at 616-22, 157 N.W.2d at 670-72.

121. *See id.* at 622 n.1, 157 N.W.2d at 672 n.1.

122. *See id.*

It is possible that the expert's inability to estimate the amount of the loss was part of a strategy on the part of McKinnon to establish the propriety of injunctive relief, but McKinnon's own willingness to place a figure on the decline in value seems inconsistent with such a strategy. *See supra* text accompanying note 121. In any event, once an injunction was denied on the ground of an equitable defense, the prior testimony of the expert about his inability to assess the amount of the depreciation would weaken McKinnon's attempt to recover damages.

123. Whether the certainty doctrine would be invoked to deny McKinnon any recovery may also depend on the weight given to the various reasons for denying an injunction. One of the reasons—hardship on Benedict—would not be cause to deny damages. But two of the reasons—inadequacy of consideration and disparity in the business experience of the parties—might lead the court to invoke the certainty doctrine to deny McKinnon any recovery. *Cf. infra* text accompanying notes 140-44 (reasons for denying equitable relief may not be grounds for denying damages under the certainty doctrine).

124. *See supra* text accompanying note 57.

contract.[125] To avoid harsh applications of the doctrine, courts developed a series of modifications that would allow the plaintiff to prove damages when the facts warranted.[126] As a consequence, the certainty doctrine was less a rule compelling judges to disallow damages than a principle that judges were free to invoke whenever there was a risk that a jury might be overly generous in quantifying the plaintiff's loss.[127]

Contemporary authorities confirm that application of the doctrine is discretionary rather than mandatory. Section 1-106 of the Uniform Commercial Code urges that remedies "be liberally administered" to the end of compensating the aggrieved victim of a breach.[128] In the comments to the same section, the draftsman explains why stringent application of the certainty doctrine would be inconsistent with the compensation goal: "[One purpose of this section] is to reject any doctrine that damages must be calculable with mathematical accuracy. Compensatory damages are often at best approximate: they have to be proved with whatever definiteness and accuracy the facts permit, but no more."[129] The Second Restatement of Contracts elaborates further on the discretion afforded courts in applying the doctrine:

> Doubts are generally resolved against the party in breach. A party who has, by his breach, forced the injured party to seek compensation in damages should not be allowed to profit from his breach where it is established that a significant loss has occurred. A court may take into account all the circumstances of the breach, including willfulness, in deciding whether to require a lesser degree of certainty, giving greater discretion to the trier of the facts. Damages need not be calculable with mathematical accuracy and are often at best approximate.[130]

In exercising its power to withhold a case from the trier-of-fact, a court, following the Code or the Restatement, will base its decision on the entire circumstances of the dispute. If this process seems to produce sharply discontinuous outcomes in any two cases, those outcomes may reflect a normative judgment by the court, based on the facts, that one plaintiff, but not the other, deserves a chance to prove damages to the satisfaction of the trier-of-fact.[131]

As an example of the willingness of courts to tolerate great uncertainty when the facts warrant, *Van Wagner Advertising Corp. v. S & M Enterprises*[132] merits detailed scrutiny. Van Wagner held a lease for ten years (including options) on space facing the Queens Midtown Tunnel, one of New York City's major automobile arteries. Van Wagner erected an illuminated billboard at the site, which it subleased for three years to another advertising company. S & M purchased the building on which the billboard was located with the intention of razing the property and redeveloping the entire block. When S & M terminated the lease, Van Wagner sued for specific performance.

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125. *See* E. FARNSWORTH, *supra* note 23, at 881; C. MCCORMICK, THE LAW OF DAMAGES 97-99 (1935).

126. C. MCCORMICK, *supra* note 125, at 101-04.

127. *Id.* at 101.

128. U.C.C. § 1-106.

129. *Id.* at comment 1.

130. RESTATEMENT (SECOND) OF CONTRACTS § 352 comment a (1981).

131. *Cf.* Chafee II, *supra* note 24, at 1096 (judge in setting damages is unlikely to disregard factors that led to denial of equitable relief).

132. 67 N.Y.2d 186, 492 N.E.2d 756, 501 N.Y.S.2d 628 (1986).

The trial court denied specific performance on the grounds that Van Wagner had an adequate remedy at law in damages and that the equitable remedy would cause disproportionate harm to S & M. The court limited Van Wagner's recovery of damages to the revenues lost on the sublease for the period through trial, without prejudice to a new action by Van Wagner for subsequent damages if S & M continued to refuse to allow it to occupy the space.[133]

By awarding damages only up to the judgment date, the trial court implicitly accepted the position of both parties, made clear in their cross appeals, that future damages were too speculative.[134] Van Wagner, in support of specific performance, argued that the advertising space at issue was unique and that damages extrapolated from the existing three-year sublease would not be adequate compensation for its loss on the remainder of the lease.[135] S & M, in resisting Van Wagner's alternative claim to damages, argued that assessing future rents on the space was necessarily conjectural, particularly in light of two contingencies in the lease giving the owner the right to terminate upon a sale of the property or upon a reletting of the building to a tenant who needed the space for its own purposes.[136]

The New York Court of Appeals affirmed the decision to deny specific performance, but reversed the decision to limit damages to the period through trial, holding that Van Wagner was entitled to recover damages for the entire lease period without having to bring a multiplicity of suits.[137] The Court of Appeals thus rejected the position of both parties and the (implicit) holding of the trial court that future damages were too uncertain. Although some of the arguments made by the Court of Appeals in support of its holding are unpersuasive,[138] one passage in the opinion offers a convincing rationale for not allowing S & M to benefit from rigid application of the certainty doctrine:

> S & M having successfully resisted specific performance on the ground that there is an adequate remedy at law, cannot at the same time be heard to contend that damages . . . must be denied because they are conjectural . . . . If any uncertainty is generated by the two contingencies, the benefit of the doubt must go to Van Wagner and not the contract violator.[139]

The court's willingness to tolerate uncertainty in the assessment of damages can also be justified by considering why Van Wagner failed to obtain specific performance. The court itself offered two reasons for denying the equitable

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133. *Id.* at 191, 492 N.E.2d at 758, 501 N.Y.S.2d at 630.

134. *Id.* at 194, 492 N.E.2d at 760, 501 N.Y.S.2d at 632.

135. *Id.* at 192, 194, 492 N.E.2d at 759-60, 501 N.Y.S.2d at 631-32.

136. *Id.* at 194, 492 N.E.2d at 760, 501 N.Y.S.2d at 632-33.

137. *Id.* at 196, 492 N.E.2d at 762, 501 N.Y.S.2d at 634.

138. The court stated that projecting damages into the future was hardly novel in the law, particularly when the value of the lease could be determined by comparisons with Van Wagner's other billboard leases. *Id.* at 194, 492 N.E.2d at 760-61, 501 N.Y.S.2d at 633. This argument ignores Van Wagner's telling point that the space at issue was truly unique, as the trial court and the Court of Appeals itself were willing to concede. *Id.* at 192-94, 492 N.E.2d at 759-60, 501 N.Y.S.2d at 631-32. As to S & M's right to terminate the lease upon various contingencies, the court noted that those contingencies might never occur, which is a weak response to S & M's argument that the *chance* of the lease being terminated for legitimate reasons made future damages necessarily conjectural. *Id.* at 194-95, 492 N.E.2d at 760-61, 501 N.Y.S.2d at 632-33.

139. *Id.* at 194-95, 492 N.E.2d at 761, 501 N.Y.S.2d at 633.

remedy: adequacy of damages and disproportionate harm to S & M.[140] A subsequent section of this Article offers another explanation for the result.[141] What all these rationales have in common is that none is a ground for denying Van Wagner monetary compensation for the breach.[142] By contrast with the facts in *McKinnon*,[143] both parties were experienced businesses, there were no flaws in the bargaining process, and the consideration was adequate. Van Wagner deserved the opportunity to establish damages for the entire lease period not because they were actually provable with reasonable certainty, but because the facts did not justify forcing it to bring a multiplicity of suits to vindicate its legitimate claim to expectation damages for the breach.

Van Wagner demonstrates that a plaintiff may be allowed to establish damages for its entire claim when the facts of the dispute justify setting aside the certainty doctrine. Courts also have the flexibility to allow the plaintiff to recover part of its loss in appropriate circumstances.[144] If, for example, a breach of contract has caused both objective and subjective loss, a court may instruct the jury to ignore the subjective loss and limit its award to objectively provable damages (such as a decline in market value).[145]

Even without explicit instruction, the jury as trier-of-fact may reflect in its assessment of damages the particular facts that induced the court to deny equitable relief.[146] In an interesting series of cases decided during the 1920s arising out of feverish speculation in real estate, the Supreme Court of South Carolina was asked to decide whether to order specific performance after a boom (or bust) in real estate values.[147] Although specific performance is generally the rule in this context,[148] the court decided in the first two cases to deny that rem-

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140. *Id.* at 194-95, 492 N.E.2d at 761, 501 N.Y.S.2d at 633. For criticism of the court's use of the adequacy doctrine to justify denying specific performance, see E. YORIO, *supra* note 3, § 15.5, at 395; Laycock, *supra* note 2, at 751-52.

141. *See infra* text accompanying notes 174-78 (denying specific performance prevents the plaintiff from using an equitable decree to negotiate an overcompensatory settlement).

142. If the rationale for denying specific performance is adequacy of damages, damages should be awarded in the amount adequate to compensate for the plaintiff's loss. If the rationale is to avoid disproportionate harm to the defendant from specific performance, an award of damages in the amount of the plaintiff's loss avoids the envisioned harm. If the rationale is to prevent the plaintiff from using specific performance to obtain an overcompensatory settlement, denying specific performance accomplishes that objective and there is no reason to deny the plaintiff damages in a compensatory amount.

See also infra text accompanying notes 277-82 (reasons for denying specific performance may not weaken plaintiff's claim to expectation damages).

143. *See supra* text accompanying notes 118-20.

144. RESTATEMENT (SECOND) OF CONTRACTS § 352 comment a (1981) (inability to prove the total amount of a loss need not bar the plaintiff from any recovery, but merely excludes those damages not established with reasonable certainty).

145. *Cf.* R. SHARPE, *supra* note 97, at 367-68 (resisting specific performance allows the defendant to retain subjective value).

146. *See* Z. CHAFEE, *supra* note 45, at 27 (jury may be as sensitive as judge to defendant's unconscionable behavior); R. SHARPE, *supra* note 97, at 368 (juries influenced by same factors that led judge to deny specific relief); Chafee I, *supra* note 38, at 894 (success in equity may give defendant a sympathetic jury).

147. *See* Welling v. Crosland, 129 S.C. 127, 123 S.E. 776 (1923); Sumner v. Bankhead, 119 S.C. 78, 111 S.E. 891 (1921); Schmid v. Whitten, 114 S.C. 245, 103 S.E. 553 (1919).

For an explanation of the reasons for the speculative fever, see Welling v. Crosland, 129 S.C. 127, 158-59, 123 S.E. 776, 787 (1923) (Fraser, J., dissenting).

148. *See* E. YORIO, *supra* note 3, §§ 10.2.1, 10.3.1.

edy on the ground that the contracts were "speculative."[149] In the second of these cases, the court limited the plaintiff's remedy to retention of a downpayment that the agreement at issue fixed as liquidated damages in the event of breach.[150] The ultimate remedial outcome in the first case is less clear.[151] One possibility was that the plaintiff would recover damages at law measured by the difference between the market value of the land and the contract price. If so, the defendant's success in resisting specific performance would turn out to be a Pyrrhic victory.[152]

That the actual damages awarded were likely to be far less became clear in a case decided four years later. Faced with the same issue, the court distinguished its prior holdings and ordered specific performance.[153] A dissenting judge, who had written one of the previous opinions denying specific performance[154] and had concurred in the other,[155] made clear what was really at stake: if specific performance were denied, the plaintiff would have to face a jury as the trier-of-fact, which would determine how much he had lost.[156] The dissenter prefaced this reference to the jury with a description of the speculative craze that gripped the South Carolina real estate market in 1920.[157] What the dissenter almost certainly envisioned as the sequel to an equitable defense was an assessment of damages by the jury that would reflect its own awareness of the speculative fever that had led the court to deny specific performance in the prior cases.

Similar considerations may explain why the Supreme Court of Minnesota in *Hilton v. Nelsen*,[158] after denying specific performance, insisted that both parties be given the right on remand to elect a jury trial on the damages issue even though both may have waived a jury trial in the court below.[159] It is hard to imagine a Minnesota jury not being influenced in setting damages by these facts: the defendant (Nelsen) was a native Minnesotan; the plaintiff (Hilton) was a sophisticated, out-of-state, real estate investor; the contract was drafted by Hilton and slanted in his favor; and Nelsen was not represented by a lawyer at the execution of the contract and did not understand basic terms in the agreement.[160]

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149. Sumner v. Bankhead, 119 S.C. 78, 81, 111 S.E. 891, 892 (1921); Schmid v. Whitten, 114 S.C. 245, 251, 103 S.E. 553, 554 (1919).

For an early case in which specific performance against a buyer was denied after a bust in a speculative real estate market, see Savile v. Savile, 1 P. Wms. 745, 24 Eng. Rep. 596 (Chancery 1721).

150. Sumner v. Bankhead, 119 S.C. 78, 81, 111 S.E. 891, 892 (1921).

151. On the issue of damages, the court merely stated: "[l]et the respondent sue on the law side for damages if he has sustained any." Schmid v. Whitten, 114 S.C. 245, 252, 103 S.E. 553, 554 (1919).

152. *See supra* text accompanying notes 31-37.

153. *See* Welling v. Crosland, 129 S.C. 127, 123 S.E. 776 (1923).

154. *See* Sumner v. Bankhead, 119 S.C. 78, 79, 111 S.E. 891 (1921) (Fraser, J.).

155. *See* Schmid v. Whitten, 114 S.C. 245, 252, 103 S.E. 553, 554 (1919) (Fraser, J., concurring).

156. Welling v. Crosland, 129 S.C. 127, 159, 123 S.E. 776, 787 (1923) (Fraser, J., dissenting).

157. *Id.* at 158-59, 123 S.E. at 787 (Fraser, J., dissenting).

158. 283 N.W.2d 877 (Minn. 1979). For additional discussion of this case, see *supra* text accompanying notes 25-35 & 102-07.

159. *Hilton*, 283 N.W.2d at 884 n.6.

160. *See supra* text accompanying notes 27-29.

C. *Bargaining in the Shadow of Equitable Defenses*[161]

In an influential article, Calabresi and Melamed distinguish between "property" and "liability" rules for protecting legal entitlements.[162] A right is protected by a property rule if it can be appropriated by a nonowner only by first purchasing permission from the holder of the right. If the nonowner does not offer enough, the holder may veto a transfer of the right. Failure to purchase a property right in advance may subject a taker to a special sanction such as a fine or imprisonment. By contrast, if a legal right is protected by a liability rule and is appropriated by a nonowner, the original holder of the right is entitled only to compensation in money damages set by an agent of the state.[163]

A contractual plaintiff's entitlement is protected by a property rule when specific performance or an injunction is the normal remedy for breach of the contract at issue.[164] Upon issuance of an equitable decree, the defendant must either comply or purchase the plaintiff's right to performance in negotiations. Failure to comply or to purchase a release may subject the defendant to penalties for civil or criminal contempt.[165]

The effect of a specific performance decree on the relative bargaining position of the parties depends on whether the defendant may satisfy the decree by arranging a substitute in the market. A defendant who is ordered to perform routine construction work, for example, can comply with the decree by hiring a surrogate to do the work. The effect of specific performance on bargaining between the parties is likely to be minimal because the defendant need only use the amount that would have been assessed as damages to arrange a substitute transaction.[166]

Many cases in which specific performance is ordered, however, involve obligations for which cover in the market is impossible.[167] In these cases, the de-

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A judge as trier-of-fact may also be influenced in assessing damages by the same facts that led to the denial of equitable relief. *See* Chafee II, *supra* note 24, at 1096 (judge unlikely to disregard factors that led to denial of equitable relief).

161. This phrase derives from the title of an article that appeared in 1979. *See* Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); *see also* Cooter & Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982).

162. Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

163. *Id.* at 1092, 1106-10.

164. *See* Yorio, *supra* note 3, at 1406-07.

165. *See* E. FARNSWORTH, *supra* note 23, at 820 (defendant who disobeys court order may be subject to criminal contempt at the instance of the court and to civil contempt at the instance of the plaintiff); H. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 17 (2d ed. 1948) (equitable decrees backed by fines or imprisonment for contempt).

166. *Cf.* Schwartz, *supra* note 4, at 286-87 (if seller is able to cover in the market, order of specific performance is unlikely to increase the costs of settlement negotiations); Yorio, *supra* note 3, at 1399-401 (legal rule that allows promisor to perform through a surrogate reduces the costs of negotiations between the parties to settle their dispute).

167. *See* RESTATEMENT (SECOND) OF CONTRACTS § 360(b) (1981) (difficulty of obtaining a substitute is an important factor in ordering specific relief); Laycock, *supra* note 2, at 691, 703 (modern test of inadequacy of damages and of propriety of specific performance is whether the plaintiff can use damages to replace the specific thing he has lost).

fendant lacks the option of arranging a substitute transaction or the option available under a liability rule of paying a sum of damages to satisfy her legal obligation.[168] Faced with the prospect of a judicial order and possible contempt, the defendant has reason to offer generous terms in settlement negotiations.[169]

The plaintiff's bargaining advantage is reduced whenever there is a chance that the court will be persuaded to deny specific performance or an injunction on the ground of an equitable defense. Because an equitable defense converts the protection afforded the plaintiff's entitlement from a property rule to a liability rule, the plaintiff may be forced to accept less favorable terms for settling the dispute.

The effect of equitable defenses on negotiations between the parties may be illustrated by a leading nineteenth century case, *Edwards v. Allouez Mining Co.*[170] Allouez built a mill on its property for use in copper mining. As a result of its operations, large quantities of sand were carried down a stream and deposited on nearby land. Edwards purchased a tract of the affected land, hoping to force Allouez to purchase the land at an inflated price in order to continue its operations. When negotiations between the parties broke down, Edwards brought suit for an injunction barring Allouez from depositing silt on his land. The Michigan Supreme Court denied the injunction on the ground that a party who invites injury by buying land affected by a nuisance has no claim to equitable relief even though he may have redress in a court of law.[171]

These facts dramatize how an equitable defense may be used to block an attempt by a plaintiff to use an injunction to extort an overcompensatory settlement. If Edwards had succeeded in obtaining an injunction, compliance by Allouez might have been prohibitively expensive. Rather than incur that cost, Allouez would have reason to offer generous terms to induce Edwards to settle the dispute. Edwards would have an incentive to hold out as long as possible to extract an even more favorable settlement.[172] By invoking an equitable defense,

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168. *See* Calabresi & Melamed, *supra* note 162, at 1106-10.

169. *Cf.* Bracewell v. Appleby, [1975] Ch. 408, 416 (injunction would place plaintiffs in "an unassailable bargaining position").

170. 38 Mich. 46 (1878).

171. *Id.* at 51-52.

A vigorous dissenting opinion objected that the majority's reasoning makes the outcome dependent on who brings the lawsuit. *Id.* at 54 (Campbell, J., dissenting). The original owner, who did not invite the injury, presumably would be entitled to an injunction.

One commentator has defended the holding in *Edwards* on the ground that the burden on Allouez from being enjoined would probably be greater than the harm to the subservient lands from the silt deposits. *See* Chafee II, *supra* note 24, at 1093. Under this rationale, not only Edwards, but the original owner as well, would be denied an injunction and limited to damages measured by the decline in the value of the land caused by the nuisance. Allouez in effect obtains a private right of eminent domain to deposit silt over nearby lands. *Id.*

The extension of the eminent domain power countenanced by this analysis may be criticized for tolerating—indeed encouraging—a partial taking of property at a price (market value) that the injured party might not have accepted voluntarily. *See* R. EPSTEIN, TAKINGS 164-65 (1985) (need to control private use of eminent domain power leads to "clear preference for injunctive relief"). This suggests that the majority in *Edwards* may have been correct in limiting its holding—and the equitable defense—to plaintiffs who, by purchasing land subject to a nuisance, hope to use the legal system to perpetrate a form of extortion.

172. *See* R. EPSTEIN, *supra* note 171, at 230 ("holdout value of demand for injunctive relief is enormous").

the court was able to prevent Edwards from using the legal system to perpetrate legal extortion.[173]

Van Wagner Advertising Corp. v. S & M Enterprises[174] demonstrates that courts remain unwilling to grant equitable relief if its effect would be to give the plaintiff excessive leverage in the bargaining process. Van Wagner sought specific performance of a promise to lease space overlooking one of New York City's major motor vehicle arteries. Conceding that the location was unique, the Court of Appeals nevertheless denied specific performance.[175] Noting that the equitable remedy might impede S & M's plans for razing the building and redeveloping the property, the court concluded that the harm to S & M from specific performance would exceed the benefit to Van Wagner.[176]

The court's fear about inhibiting redevelopment may have been unfounded—S & M probably would have been able to purchase Van Wagner's right to performance in bargaining between the parties subsequent to a specific performance decree.[177] But Van Wagner would have an incentive to hold out as long as possible in the negotiations and S & M would have reason to offer a generous settlement to be rid of a troublesome obstacle to its redevelopment plans. By denying specific performance, the court deprived Van Wagner of leverage to obtain an overcompensatory settlement.[178]

D. *Summary*

After denying specific performance or an injunction on the ground of an equitable defense, a court is not forced to choose between rescinding the contract in its entirety (and thus depriving the plaintiff of any relief) or awarding the monetary equivalent of performance as damages. A court may limit the plaintiff's recovery to restitution or reliance damages or may enforce a liquidated damages provision agreed to by the parties. Application of the mitigation or certainty doctrine may result in an award of damages that falls short of the monetary value of performance. Discretion of the trier-of-fact in assessing damages may have the same effect. The existence of separate equitable defenses may also influence negotiations between the parties by depriving the plaintiff of leverage to obtain an overcompensatory settlement.

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173. *See Edwards*, 38 Mich. at 52 (no reason why plaintiff "should have the assistance of an injunction to aid his schemes").

174. 67 N.Y.2d 186, 492 N.E.2d 756, 501 N.Y.S.2d 628 (1986). For a more extensive discussion of this case, see *supra* text accompanying notes 132-43.

175. *Van Wagner*, 67 N.Y.2d at 195-96, 492 N.E.2d at 761-62, 501 N.Y.S.2d at 633-34.

176. *Id.* at 195, 492 N.E.2d at 761, 501 N.Y.S.2d at 633.

177. *See* Yorio, *supra* note 3, at 1398 (parties have ability to negotiate around specific performance decree).

178. The plaintiff in *Van Wagner* abandoned possession of the billboard space to the defendant under protest. *See Van Wagner*, 67 N.Y.2d at 190, 492 N.E.2d at 758, 501 N.Y.S.2d at 630. This fact suggests that the plaintiff might have sought to remove the defendant from possession by the legal remedy of ejectment. *See* Sun Oil Co. v. Fleming, 469 F.2d 211, 214 (10th Cir. 1972) (ejectment rather than specific performance is the proper remedy for recovery of property from which lessee was improperly evicted). As a legal remedy, ejectment is technically not subject to equitable defenses. But the same factors that led the court to deny specific performance of the lease—hardship on the defendant and the risk of an overcompensatory settlement—probably would have deterred the court from ejecting the defendant and restoring the space to the plaintiff. *Cf. infra* text accompanying notes 232-34 (reasons for denying specific performance may also bar expectation damages).

V. FLAWS IN THE CRITICISMS OF EQUITABLE DEFENSES

The preceding part has demonstrated that the premises of the critics of equitable defenses are seriously flawed. After denying equitable relief, a court is not limited in its remedial choices to either awarding its equivalent in damages or denying any relief whatsoever. Still, some of the observations of the critics are accurate. Differences between equitable and legal defenses are now less dramatic in practice than theory would suggest. As legal defenses have gradually expanded, the number of cases in which damages may be granted after equitable relief is denied has diminished.[179] That trend has almost certainly accelerated with the merger of courts of law and equity into unified judicial systems.[180]

Despite these developments, it is premature to sound the death-knell for separate equitable defenses. The Second Restatement of Contracts and other modern authorities continue to endorse traditional doctrine by noting situations in which the facts support an equitable defense, but not rescission of the contract in its entirety.[181] However reduced in number, there are cases decided in the 1980s in which appellate courts endorse an award of damages in lieu of specific performance when the facts warrant.[182] The legal system has been unwilling thus far to discard a long tradition of separate defenses to equitable relief.[183]

Critics of equitable defenses also underestimate the practical effect of separate equitable defenses on negotiations between the parties to a contractual dispute. Current law imposes a risk on the plaintiff that specific relief may be denied based on an equitable defense and a risk on the defendant that damages may be awarded despite success in equity. If the legal system adopted unified defenses to legal and equitable remedies, those risks would change and the outcome of bargaining between the parties in certain cases might be considerably different.[184]

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179. *See* RESTATEMENT (SECOND) OF CONTRACTS § 364 comment a (1981) (gradual expansion of legal defenses has narrowed the area of traditional distinction between equitable and legal relief).

180. *Cf.* Chafee I, *supra* note 38, at 895 (issue of defenses is the same in law and equity after merger).

181. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 364, illustrations 3-4 (1981); E. FARNSWORTH, *supra* note 23, at 837-38.

182. *See, e.g.*, Peachtree on Peachtree Investors Ltd. v. Reed Drug Co., 251 Ga. 692, 308 S.E.2d 825 (1983) (affirmance of trial court's decision that lessee's remedy should be limited to damages based on the fair market value of the lease); Route 73 Bowling Center, Inc. v. Aristone, 192 N.J. Super. 80, 84, 469 A.2d 85, 87-88 (1983) (remand to determine damages after denial of specific performance on ground of public policy); Van Wagner Advertising Corp. v. S & M Enters., 67 N.Y.2d 186, 492 N.E.2d 756, 501 N.Y.S.2d 628 (1986) (lessee held entitled to damages for entire lease period after denial of specific performance on ground of hardship to defendant); Pecorella v. Greater Buffalo Press, Inc., 107 A.D.2d 1064, 1066, 486 N.Y.S.2d 562, 563-64 (4th Dept. 1985) (trial court may award damages after denial of specific performance on ground of equitable defense); Patel v. Ali, [1984] 1 Ch. 283, 1 All E.R. 978 (defendant ordered to furnish security for damages after denial of specific performance on grounds of hardship and changed circumstances).

183. The distinction between rescinding a contract in its entirety and simply denying specific performance dates to at least the early nineteenth century. *See* Cadman v. Horner, 18 Ves. 10, 34 Eng. Rep. 221 (1810); *see also* Day v. Newman, 2 Cox. Ch. 77 (1788) (specific performance denied because of disparity between contract price and value of the subject property).

184. Abolishing separate equitable defenses may also affect the original negotiations between parties in setting the terms of their agreement. For example, a party who foresees a risk of extortionate demands due to the availability of specific performance and the abolition of equitable defenses, *see supra* text accompanying notes 177-78, may exact a greater price in contractual negotiations to protect against that risk. This suggests that the

The charge that separate equitable defenses betray a double standard of morality in the administration of justice[185] distorts what is in fact a complex array of possible remedial responses that vary with the facts of the particular case, as the analysis in Part VI will demonstrate.[186] It is this responsiveness that is the source of one of the criticisms leveled by legal economists against equitable defenses. Because of the discretion involved in adjudicating equitable claims, it is difficult to assess the probability (or consequences) of success in asserting an equitable defense. As a result, costs to litigants and to the legal system are higher than in a world without discretionary defenses.[187] To assume, however, that an increase in costs is inefficient ignores the trade-off in terms of the benefit of having a more responsive legal system.[188]

There is reason also to doubt the claim that the existence of substance-based equitable defenses leads to inefficiency in the form of higher prices.[189] For equitable defenses to have an effect on prices, three conditions have to be met: first, buyers must be aware of the doctrine that precludes specific performance, but tolerates an award of damages; second, buyers must respond to the doctrine by reducing their search for favorable deals;[190] and third, the failure of these buyers to seek out better deals must result in higher prices. Neither the first nor the second condition is likely to be satisfied. Few, if any, buyers are likely to be aware of the doctrine of equitable defenses. Moreover, a rational buyer, even if cognizant of the doctrine, still has a powerful incentive to comparison-shop because of the likelihood that the seller will perform despite the availability of an equitable defense. Most contracts are not breached, primarily because of extra-legal sanctions from failing to perform (such as injury to the seller's goodwill).[191] Even if the seller breaches and specific performance is barred by an equitable defense, the buyer has a claim to damages. All other things being equal,[192] the better the bargain negotiated by the buyer, the higher the amount

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legal system need not be concerned with the consequences of abolishing separate equitable defenses because contractual parties will simply reflect abolition in the terms of their agreement. *See generally* Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960). However, the current system of providing for separate equitable defenses may reflect what most contractual parties want. If so, abolishing separate equitable defenses will lead to an efficiency loss in the form of higher transaction costs in negotiating contractual terms to deal with the abolition of separate equitable defenses. *See* Yorio, *supra* note 3, at 1377-80 (legal rule that reflects contractual parties' preferences minimizes transaction costs).

185. *See supra* text accompanying notes 36-37, 45-46.

186. *See infra* text accompanying notes 208-82. *Cf.* Z. CHAFEE, *supra* note 45, at 102 (difference between law and equity due not to varying levels of morality, but to the nature of the remedies involved).

187. *See* Schwartz, *supra* note 4, at 301 (separate equitable defenses generate "uncertainty costs").

188. *Cf.* Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 467-68 (1974) (examination of trade-offs in determining allocative efficiency); Yorio, *supra* note 3, at 1414-15, 1423-24 (legal system would suffer loss if courts did not respond to particular facts in awarding remedies).

For illustrations of the responsiveness made possible by the existence of separate equitable defenses, see *infra* text accompanying notes 208-82.

189. *See supra* text accompanying notes 50-53.

190. *See supra* text accompanying notes 52-53 (economic criticism of equitable defenses assumes that some buyers, cognizant of the legal rule, respond by not seeking out good deals).

191. *See* Macaulay, *Noncontractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 60-65 (1963) (extralegal sanctions play greater role in planning by businessmen than legal remedies).

192. It is possible, of course, that a court's outrage at the terms of the agreement will bar the buyer from any recovery. Under those circumstances, however, it is the court's expansive view of legal defenses rather than the existence of separate equitable defenses that gives the buyer a disincentive to negotiating a favorable deal.

of damages awarded is likely to be.[193] Given these incentives to seek out the best possible terms, it is unsafe to conclude, in the absence of empirical evidence, that abolishing substantive equitable defenses would have the effect of lowering prices.[194]

VI. THE NORMATIVE CASE FOR EQUITABLE DEFENSES

Parts IV and V of this Article have exposed flaws in both the premises and conclusions of the critics of separate equitable defenses. The weakness of the case against these defenses is ample reason for the legal system to hesitate before treating legal and equitable defenses identically, but a definitive judgment on this issue requires an analysis of the affirmative arguments for retaining separate defenses to equitable relief.

A. *Restraint on State Power*

Under American law, courts have the ability to punish violations of equitable decrees with fines or imprisonment for contempt.[195] Under the civil law, courts rarely exercise comparable contempt power[196] despite the underlying premise of the civil law that the injured party is entitled to a judgment for performance.[197] Civil law systems rely on a great variety of indirect methods of securing performance that are less coercive than the contempt power.[198] Because enforcement orders are rarely directed personally to the defendant, the

193. The point in the text is obvious if the buyer succeeds in recovering damages measured by the difference between the market (or cover) price and the contract price. *See* U.C.C. §§ 2-711(1)(a), 2-712(1), 2-713(1) (buyer entitled to recover damages measured by the difference between either the market or cover price and the contract price). The lower the contract price (and the better the deal), the higher the amount of damages will be.

194. *Cf.* Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717, 1744-51 (1982) (common-law contract rules have minimal allocative effect).

195. *See* FED. R. CIV. P. 70 (court may in the proper case adjudge party in contempt); E. FARNSWORTH, *supra* note 23, at 820 (defendant subject to criminal contempt at the instance of the court and to civil contempt at the instance of the plaintiff for violating court order); H. MCCLINTOCK, *supra* note 165, at § 17 (equitable decrees enforced by fines or imprisonment for contempt).

196. *See* B. NICHOLAS, FRENCH LAW OF CONTRACT 215 (1982) (French law notable for absence of contempt power); Dawson, *supra* note 24, at 516, 527-28 (French and German courts usually do not exercise contempt power to force defendant to perform); Treitel, *Remedies for Breach of Contract*, VII INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 16-15, 16-29 (1976) (to the same effect).

197. *See* B. NICHOLAS, *supra* note 196, at 210-11 (specific performance generally available under French law for contracts to convey ownership of property); N. HORN, H. KÖTZ, & H. LESER, GERMAN PRIVATE AND COMMERCIAL LAW 90 (T. Weir trans. 1982) (injured party entitled to performance under German law); Dawson, *supra* note 24, at 524 (injured party entitled to performance of many contracts under French law); Treitel, *supra* note 196, at 16-12, 16-18 (injured party entitled to performance under French and German law).

198. In the case of a promise to convey moveable goods, a civil law court may simply have the goods seized and transferred to the plaintiff. *See* B. NICHOLAS, *supra* note 196, at 211 (French law); Dawson, *supra* note 24, at 527 (German law); Treitel, *supra* note 196, at 16-15, 16-29 (French and German law). In the case of real estate, a court may eject the defendant and put the plaintiff in possession or may transfer title to the plaintiff by a self-executing judgment. *See* B. NICHOLAS, *supra* note 196, at 211 (French law); Dawson, *supra* note 24, at 527 (German law); Treitel, *supra* note 196, at 16-15, 16-29 (German and French law). In the case of a delegable duty, a court may issue an order permitting the plaintiff to engage a surrogate to carry out the duty in place of the defendant. *See* B. NICHOLAS, *supra* note 196, at 211-12 (French law); Dawson, *supra* note 24, at 527 (German law); Treitel, *supra* note 196, at 16-15, 16-20 (French and German law). The defendant is usually liable for the cost of a surrogate, which the court may require to be paid in advance. *See* Treitel, *supra* note 196, at 16-15.

civil law plaintiff usually obtains performance without placing the defendant at risk of imprisonment for contempt.[199]

The contrast between the exercise of the contempt power in common and civil law systems led the eminent scholar John Dawson to attribute the exceptional nature of equitable relief in American law to the weight of public force brought to bear against a recalcitrant promisor.[200] Dawson argued that equitable discretion has the practical effect of limiting the area in which coercion is employed by American courts,[201] but plays a much smaller role in civil law systems because the defendant is rarely in jeopardy of imprisonment for contempt.[202]

Dawson's insight explains why a system that places the defendant at risk of imprisonment would temper the exercise of coercion by adopting liberal defenses to equitable relief.[203] But Dawson himself stressed that this rationale for equitable defenses would become less cogent if American law moved from the contempt power to indirect methods of specifically enforcing contracts.[204] To a considerable extent, this change has already occurred.[205] If, for example, a defendant refuses to convey property pursuant to a specific performance decree, a court may appoint someone to execute the deed, may issue a writ of attachment or sequestration against the property of the defendant, or may divest the defendant of title and vest title in the plaintiff of property within the court's jurisdiction.[206] If a decree directs the defendant to perform a specific act and she refuses, a court may direct the act to be done by some other person at the cost of the disobedient party.[207] The replacement in these situations of the contempt power by indirect methods of specifically enforcing contracts has weakened the case for equitable defenses as a restraint on the exercise of state power. Equitable defenses now need an independent justification for their continued existence.

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199. Although use of the contempt power to enforce contractual promises is unusual in civil law countries, there are certain promises that may give rise to a judicial order backed by contempt. *See, e.g.*, Treitel, *supra* note 196, at 16-15 (German court may issue order to defendant to perform nondelegable duty); *see also*, Dawson, *supra* note 24, at 527-28 (to same effect).

200. Dawson, *supra* note 24, at 535-38.

201. *Id.* at 536.

202. *See id.* at 530 (German judges do not have the discretionary power to refuse specific performance as a way of obviating hardship or discouraging sharp bargaining).

203. *See* E. FARNSWORTH, *supra* note 23, at 823 ("severity of the sanctions available" for contempt may be a rational explanation of the rarity of equitable relief in American law).

204. *See* Dawson, *supra* note 24, at 538 (shift from coercion to substituted performance would reduce barriers to specific performance). *Cf.* Storke, *Decrees in Rem under the New Rules*, 13 ROCKY MTN. L. REV. 140, 145 (1940) ("enforcement of any legal right by imprisonment . . . is a high-handed proceeding which can hardly be justified if there is any other practicable means of attaining the same end").

205. *See* R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 478-80 (1952) (discussion of indirect methods of enforcing decrees under state and federal law); C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3022 (1973) (list of four indirect methods of enforcing federal court judgment to perform a specific act).

206. *See* FED. R. CIV. P. 70; Buzzell v. Edward H. Everett Co., 180 F. Supp. 893, 902-03 (D. Vt. 1960); C. WRIGHT & A. MILLER, *supra* note 205, § 3022.

207. *See* FED. R. CIV. P. 70; C. WRIGHT & A. MILLER, *supra* note 205, § 3022.

B. *Remedial Flexibility*

Remedies for breach of contract in American law generally may be viewed as lying on a continuum from specific performance to rescission of the contract.[208] To the plaintiff, specific performance affords the purest protection of the expectancy interest; rescission leaves the plaintiff without a remedy for the breach.[209] To the defendant, specific performance is usually the most unfavorable outcome[210] (even without the risk of imprisonment for contempt); rescission usually affords the defendant complete exoneration.[211]

Between these extremes lie legal remedies that give the plaintiff some relief for the breach without requiring the defendant to perform. At the end of the remedial continuum closest to rescission is restitution, a remedy that allows the nonbreaching party to recover only the value of any benefit conferred on the party in breach.[212] Moving along the continuum toward specific performance,

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208. The description of the remedial continuum in the text assumes that the contract is wholly or substantially executory on the part of the plaintiff. After substantial part performance by the plaintiff and a repudiation or material breach by the defendant, the plaintiff may sue in restitution for the reasonable value of her performance. *See* RESTATEMENT (SECOND) OF CONTRACTS § 373(1) (1981); *id.* at § 373 comment a. In the case of what would be a losing contract from the plaintiff's perspective, the amount recovered in restitution may exceed both expectation damages and the benefits of specific performance by the defendant. *Id.* § 373 comment d. Although some courts limit the plaintiff's recovery in restitution to the contract price, other courts allow the plaintiff to recover reasonable value even if it exceeds the contract price. *Compare* Wuchter v. Fitzgerald, 83 Or. 672, 163 P. 819 (1917) (recovery in restitution limited to contract price) *with* Boomer v. Muir, 24 P.2d 570 (Cal. App. 1933) (recovery in restitution in excess of contract price).

When, as in *Boomer*, the plaintiff recovers more than the contract price, the outcome falls outside the remedial continuum described in the text. Cases like *Boomer* are relatively rare, however, because a defendant usually has no reason to breach when the plaintiff has a losing contract. Moreover, the possibility of a restitutionary recovery in excess of the contract price seems never to arise in the context of equitable defenses because the plaintiff is seeking specific performance or an injunction, not restitution, for the defendant's breach.

209. Technically, rescission makes the contract unenforceable and is therefore not a remedy for breach of contract. However, if the contract is rescinded, the plaintiff may be able to obtain restitution for any benefit conferred on the defendant in performance of the contract. *See* E. FARNSWORTH, *supra* note 23, at 253-56, 662, 670 (plaintiff entitled to rescission and restitution in case of misrepresentation or mistake). Restitution does not afford the plaintiff a remedy for breach of promise; it merely returns the defendant to the precontractual position. *Id.* at 905 ("the effort [in restitution] is not to enforce the promise . . . but to prevent unjust enrichment of the party in breach"). In rare cases involving substantial part performance by the plaintiff, the remedy in restitution may exceed expectation damages. *See supra* note 208.

210. Specific performance is unfavorable because it deprives the defendant of the option of paying damages in satisfaction of her contractual obligation. *See supra* text accompanying notes 167-69. Specific performance may also deprive the defendant of subjective value that she places on the property or of interim appreciation in the market value of the property. *See supra* text accompanying notes 97-107, 145.

There are some cases in which specific performance may be preferable to damages from the defendant's perspective. For breach of a construction contract, for example, damages measured by the cost of completion presumably include a profit margin. The breaching contractor may prefer to perform herself to earn that profit. Under these conditions, however, the contractor seems more likely in litigation to deny the existence of a contract or of a breach or to raise a legal defense than to resist specific performance based on an equitable defense.

211. If the contract is rescinded, the defendant may be required to restore any benefit conferred by the plaintiff in performance of the contract. *See supra* note 208.

212. *See supra* text accompanying note 72. Although the remedy in restitution may exceed expectation damages in rare circumstances, this is almost never the case when the issue of an equitable defense arises. *See supra* note 208.

restitution is usually followed by reliance damages,[213] then liquidated damages,[214] and finally various measures of expectation damages.

The existence of this remedial continuum is the foundation of the most important asset of separate defenses to equitable relief: the ability afforded courts to shape the remedy to fit the facts of the particular case. As an illustration of this point, consider the following hypothetical. A buyer brings suit for breach of a contract for which specific performance would be the normal remedy. The seller answers by admitting nonperformance, but alleging facts in defense of the breach. Under current law, a court may hold that these facts are sufficient to constitute a defense to specific performance, but not to entitle the seller to rescission of the contract. The buyer may then be awarded a remedy for the breach that lies somewhere on the remedial continuum between specific performance and rescission.

Suppose, however, that the legal system were to abolish separate equitable defenses and treat defenses to equitable and legal relief identically. A court faced with the same facts would have only two choices: either to reject the defense and grant the buyer's request for specific performance or to accept the defense and deny the buyer both equitable and legal relief. Abolishing separate equitable defenses thus would have the practical effect of moving the outcome of contractual disputes toward the extremes of the remedial continuum. Legal doctrine would be clearer and simpler, but with a loss of sensitivity and responsiveness to circumstances that call for an outcome other than specific performance or rescission.

Separate equitable defenses enable courts to match the remedy awarded to the circumstances of the dispute. The choice faced by a court in a particular case may be between specific performance and full benefit-of-the-bargain damages.[215] More often, the choice will be between a complete remedy (specific performance or expectation damages) and a partial remedy (reliance damages or restitution).[216] Circumstances that dissuade a court from granting specific performance will often lead the court to deny benefit-of-the-bargain damages as well.[217] The judge's task is to determine whether the facts justify the remedy sought by the plaintiff.

Viewing contract remedies again in terms of a continuum helps to clarify the factors that should influence the court's decision. At the risk of some oversimplification, the point on the continuum at which the remedy awarded will lie generally depends on the reasons for denying specific performance or an injunc-

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213. Reliance damages and restitution are equal when the only action taken by the plaintiff in reliance on the contract is conferring a benefit on the defendant. Otherwise, reliance damages generally exceed restitution. *See* E. FARNSWORTH, *supra* note 23, at 814 (restitution is ordinarily less than reliance damages because it does not include expenditures in reliance that conferred no benefit on the defendant).

214. The position of liquidated damages on the continuum will vary with the facts. The amount stipulated as damages may be lower than reliance damages, placing it closer to rescission on the continuum; or the amount stipulated may be higher than expectation damages, placing it closer to—or even beyond—specific performance on the continuum. However, if the amount is so high that it is determined to be a "penalty," a court may refuse to enforce the clause. *Id.* at 895.

215. *See infra* text accompanying notes 275-82.

216. *See infra* text accompanying notes 285-86.

217. *See infra* text accompanying notes 228-34, 239-51.

tion. The remedy is most likely to approach rescission on the continuum when the agreement in dispute was defective at its inception because of misconduct by the plaintiff in the bargaining process,[218] mistake as to a material fact,[219] or terms slanted unfairly in favor of the plaintiff.[220] The remedy for breach is most likely to approach specific performance on the continuum when the equitable remedy is denied because of events subsequent to the formation of the contract, such as delay by the plaintiff resulting in prejudice to the defendant;[221] changed circumstances making specific performance hard on the defendant;[222] or injury to the public or third parties.[223]

What follows is an analysis of a series of cases in which the remedy awarded moves along the remedial continuum from restitution to full benefit-of-the-bargain damages. The facts of each case are presented in considerable detail in order to show how courts may use the flexibility afforded by equitable defenses to adopt a remedy that is appropriate in light of all the circumstances of the dispute.

In *Hodge v. Shea*,[224] Hodge, a physician, requested specific performance of a contract to convey twenty acres of land. As consideration for the land, Shea was to receive a new Cadillac Coupe DeVille (approximate cost $5400) and $4000 in cash; in addition to the land, Hodge was to receive Shea's used Cadillac. Shea had been Hodge's patient for a number of years. At the time of contract, Shea was seventy-five years old, an inebriate of long standing, and afflicted by serious chronic illnesses that rendered him infirm of body and mind. The contract was signed during a period when Hodge was treating Shea on a daily basis for various maladies. Two days later, Shea was admitted to a hospital for treatment.

On the day after Shea's discharge from the hospital, the parties partially executed the agreement by exchanging Cadillacs. Hodge later resold the used

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218. *See, e.g.*, Texas Co. v. Andres, 97 F. Supp. 454 (N.D. Idaho 1951) (misrepresentation by plaintiff's counsel); Perlmutter v. Bacas, 219 Md. 406, 149 A.2d 23 (1959) (innocent misrepresentation); Eisenbeis v. Shillington, 349 Mo. 108, 159 S.W.2d 641 (1942) (innocent misrepresentation); Hodge v. Shea, 252 S.C. 601, 168 S.E.2d 82 (1969) (abuse of confidential relationship).

219. *See, e.g.*, Nicholson v. Fawley, 112 Kan. 124, 210 P. 482 (1922) (plaintiff entitled to reliance damages measured by brokerage commission after denial of specific performance because of defendant's mistake); King v. Oxford, 282 S.C. 307, 318 S.E.2d 125 (Ct. App. 1984) (plaintiff allowed to recover reliance damages after denial of specific performance on ground of mistake).

220. *See, e.g.*, Campbell Soup Co. v. Wentz, 172 F.2d 80, 83-84 (3d Cir. 1948) (plaintiff denied both specific performance and expectation damages where contract was unreasonably slanted in its favor).

221. *See supra* text accompanying notes 97-101 (plaintiff may recover expectation damages measured at the date of breach after the denial of specific performance on the ground of delay).

222. *See, e.g.*, Van Wagner Advertising Corp. v. S & M Enters., 67 N.Y.2d 186, 492 N.E.2d 756, 501 N.Y.S.2d 628 (1986) (hardship on the defendant ground for denying specific performance, but plaintiff may obtain expectation damages for the breach); Patel v. Ali, [1984] 1 Ch. 283, 1 All E.R. 978 (hardship on defendant ground for denying specific performance, but defendant ordered to furnish security for the plaintiff's damages).

223. *See, e.g.*, Peachtree on Peachtree Investors Ltd. v. Reed Drug Co., 251 Ga. 692, 308 S.E.2d 825 (1983) (lessee entitled to expectation damages based on fair market value of lease after denial of specific performance because of public interest in urban renewal); Route 73 Bowling Center, Inc. v. Aristone, 192 N.J. Super. 80, 469 A.2d 85 (1983) (purchaser of liquor license entitled to expectation damages measured by the market price/contract price differential after denial of specific performance because of public interest in government control of liquor licenses).

224. 252 S.C. 601, 168 S.E.2d 82 (1969).

Cadillac for a gain (after repairs) of $2200.[225] Thus, the net cost to Hodge of the land was approximately $7200 (or $360 per acre).[226] Three years earlier, Shea had received an offer of $1000 per acre, which he rejected upon the advice of his son-in-law, whom Shea did not consult before signing the agreement with Hodge. The market value of the land on the contract date was fixed by a master at $1200 per acre.[227]

The Supreme Court of South Carolina rejected Hodge's request for specific performance on the grounds that the consideration was grossly inadequate, that Hodge had abused the confidential relationship of physician and patient, that the bargaining position of the parties was unequal because of Shea's mental and physical infirmities, and that Hodge had used Shea's fatuous fondness for new Cadillacs to entice him into an unfair trade.[228] One judge dissented, arguing that Shea's receipt and use of the new Cadillac without offering to reconvey it was reason to grant Hodge's request for specific performance.[229]

The dissent's objection provides a basis for a claim in restitution for the excess of the value of the new Cadillac received by Shea over the used Cadillac obtained by Hodge in return. Shea in his answer offered to make an adjustment for the excess, and the majority indicated that Hodge might apply and obtain relief in that amount.[230] The majority was willing to grant restitution based on Shea's retention of the Cadillac, but not specific performance because of Hodge's own misconduct during the bargaining process.[231]

In light of its litany of reasons for denying specific performance, it is extremely unlikely that the majority would have granted any further relief. Shea's sale of the land for $1500 per acre (subject to clearing the cloud on title caused by the contract with Hodge)[232] furnished a standard for computing expectation damages,[233] but there is no indication in the opinion that the court would have been at all receptive to a claim by Hodge to expectation damages. Nor was Hodge likely to succeed in recovering damages incurred in reliance on a contract procured by tactics regarded by the court as disreputable.[234]

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225. *Id.* at 611, 168 S.E.2d at 86.

226. Hodge transferred a new Cadillac costing $5400 and was to transfer $4000 in cash for the land. Deducting the $2200 obtained on resale of Shea's used Cadillac, Hodge's net cost for the land was $7200. Dividing this figure by twenty acres produces a net cost of $360 per acre.

227. *Hodge*, 252 S.C. at 605-06, 168 S.E.2d at 83.

228. *Id.* at 607-12, 168 S.E.2d at 84-87.

229. *Id.* at 613-14, 168 S.E.2d at 88 (Littlejohn, J., dissenting).

230. *Id.* at 612, 168 S.E.2d at 87.

231. For an early case in which the court granted restitution after denying specific performance on grounds of inadequacy of consideration and inequality in the bargaining capacity of the parties, see Wollums v. Horsley, 93 Ky. 582, 20 S.W. 781 (1892).

232. *See Hodge*, 252 S.C. at 606, 168 S.E.2d at 84.

233. Assuming that $1500 per acre was the market value of the land, Hodge would have received land worth $30,000 ($1500 per acre times twenty acres) if Shea had performed in accordance with the contract. Deducting the remaining unpaid contract price of $4000, expectation damages would be $26,000.

234. For an early case in which the court expressly refused to award the plaintiff anything above restitution, see Margraf v. Muir, 57 N.Y. 155 (1874). The plaintiff contracted to purchase a parcel of real estate for $800 from a widow with six children. The plaintiff lived near the land, and was aware that its value had recently increased to $2000. The defendant lived at a distance, and was unaware of the recent appreciation. When the defendant refused to convey the property, the plaintiff sought specific performance or expectation damages measured by the difference between the value of the land and the contract price. The trial court held for the plaintiff,

In contrast with *Hodge v. Shea*, a later case decided in the same jurisdiction, *King v. Oxford*,[235] presented facts that justified moving along the remedial continuum toward specific performance by awarding reliance damages in lieu of the equitable remedy. James King sought specific performance of a contract for the sale of a corporation owned by Mary Oxford. Under the agreement, King was to pay the difference between the fair market value of the assets and liabilities of the corporation on the date of sale, an amount the court labeled the "net asset value" of the corporation.[236] Oxford transferred possession of the business to King on October 31, 1979, but the parties did not execute a contract until November 29, 1979. The parties were subsequently unable to agree on the net asset value of the corporation, with Oxford demanding substantial compensation for her shares and King claiming that he owed nothing because the net asset value was negative. Upon Oxford's refusal to transfer the shares, King brought suit for specific performance. Oxford sought to have the contract rescinded on the grounds of fraud and mistake. The trial court decreed specific performance.[237]

In affirming the trial court's refusal to rescind the contract, the South Carolina Court of Appeals relied on the following facts. No confidential or fiduciary relationship existed between the parties. Oxford had a college education and had run the business for six years. She negotiated the terms of the agreement herself and retained a lawyer to draft the contract before signing it.[238] Any mistake as to the net asset value of the corporation was due to information supplied by Oxford, not to deceit on the part of King.

Although the court refused to rescind the contract, it reversed the trial court's decision to grant specific performance on the ground that the terms of the contract demonstrated that the parties had proceeded on the assumption that the corporation had a substantial, positive net asset value.[239] If the net asset value was negative, as King contended, the parties made a mistake of sufficient magnitude to justify a denial of specific performance.[240] The court remanded the case for a determination of the net asset value of the corporation. If it was determined to be nominal or negative, King would be denied specific performance on the ground of mistake.[241]

The court also held that if specific performance was denied, King could pursue a damages remedy for Oxford's refusal to tender the shares.[242] The court endorsed the benefit-of-the-bargain principle underlying expectation dam-

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awarding $1200 in damages. *Id.* at 156. On appeal, the New York Court of Appeals held that the trial court erred in awarding expectation damages and that the plaintiff was entitled only to restitution of the purchase money paid. *Id.* at 159-61.

235. 282 S.C. 307, 318 S.E.2d 125 (Ct. App. 1984).

236. *Id.* at 310, 318 S.E.2d at 127.

237. *See id.* at 310, 318 S.E.2d at 127.

238. *Id.* at 311-12, 318 S.E.2d at 127-28.

239. *Id.* at 315, 318 S.E.2d at 129-30.

240. *Id.* at 315, 318 S.E.2d at 130.

241. *Id.*

242. *Id.*

ages,[243] but stated that if the corporation was worthless on the date of sale, King would not suffer any expectancy damages.[244] The court seemed to assume that a nominal or negative net asset value meant that the corporation was worthless. But the fact that the case was strenuously litigated indicates that the corporation in fact had value presumably based on its future earning power. If so, King may have suffered expectation damages computed under a formula such as the difference between the market value of the shares and the contract price.[245]

In light of the parties' apparent mutual mistake, however, the court almost certainly would have refused to allow King to recover expectation damages[246] because that result would undo most of what the denial of specific performance accomplished.[247] King was entitled nevertheless to some relief for Oxford's breach, as the court made clear in endorsing an award of any natural, direct, and proximate damages incurred in reliance on the contract.[248] By contrast with the plaintiff in *Hodge v. Shea*,[249] King had a legitimate claim to reliance damages because the contract on which he relied was not the product of any misconduct on his part, nor of any mental or physical infirmity on the part of Oxford. Because she was more responsible than King for the parties' apparent mistake as to the net asset value of the corporation,[250] the court required her to bear any loss suffered by King in reliance on the contract.[251]

A court may move beyond restitution and reliance damages on the remedial continuum by enforcing a liquidated damages provision agreed to by the parties. In *Campbell Soup Co. v. Wentz*,[252] the court refused to grant specific performance of a contract for the sale of carrots because certain terms were slanted unfairly in favor of Campbell, in particular a clause excusing Campbell from accepting the carrots under certain circumstances, but preventing the grower from reselling the carrots to third parties unless Campbell agreed.[253] Although the court denied specific performance,[254] it insisted that the contract

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243. *Id.* ("[t]he measure of damages . . . is the amount necessary to put King in the same position as if the contract had been fulfilled"). *See supra* text accompanying note 32.

244. *See King*, 282 S.C. at 316, 318 S.E.2d at 130.

245. *See* E. YORIO, *supra* note 3, § 12.2.1.1, at 310-11 (damages for breach by seller may be measured by the difference between the market and contract price of corporate shares).

Of course, assessing the market value of shares in a close corporation may be difficult, making specific performance a common remedy in a case not affected by an equitable defense. *See id.* § 12.2.1.2, at 314 (absence of market in shares makes it difficult to assess damages and may justify specific performance).

246. *See* E. FARNSWORTH, *supra* note 23, at 653-63 (mutual mistake as to a material fact may entitle nonperforming party to avoid contract).

247. Instead of the shares, King would obtain their monetary equivalent as damages because the contract price determined under the formula in the contract was apparently zero. *See supra* text accompanying notes 232-34 (reasons for denying specific performance may also bar expectation damages).

248. *See King*, 282 S.C. at 316, 318 S.E.2d at 130. King had substantially changed his position by making business arrangements with third parties on behalf of the corporation. *See id.* at 313-14, 318 S.E.2d at 129.

249. *See supra* text accompanying notes 224-33.

250. *See King*, 282 S.C. at 312, 318 S.E.2d at 128.

251. *See also* Nicholson v. Fawley, 112 Kan. 124, 210 P. 482 (1922) (plaintiff entitled to reliance damages after denial of specific performance on ground of defendant's unilateral mistake).

252. 172 F.2d 80 (3d Cir. 1948).

253. *Id.* at 83.

254. Technically, Campbell's requested relief was not specific performance, but injunctions preventing the grower from selling the carrots to anyone but Campbell and ordering the grower to deliver the carrots to Camp-

was not illegal and that the grower had no excuse for his deliberate breach.[255] One clause in the contract provided for liquidated damages of $50 per acre for any breach by the grower.[256] The court's insistence on the validity of the contract probably meant that Campbell would have succeeded in enforcing the liquidated damages provision had it sought damages in the stipulated amount.[257] The clause giving Campbell the right to veto third-party sales, though a bar to specific performance, need not have undermined the provision for liquidated damages.[258]

In *Sumner v. Bankhead*,[259] Sumner contracted to resell real estate not yet in his possession to Bankhead. At the time of contract, Bankhead made a down-payment of ten percent on the purchase price, which the contract stipulated as damages in the event of Bankhead's failure to perform. The agreement was signed during a period of feverish speculation in real estate,[260] with both parties speculating on a continued rise in land values.[261] When the market in real estate

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bell. *See* Campbell Soup Co. v. Wentz, 75 F. Supp. 952 (E.D. Pa. 1948). The effect of a mandatory injunction ordering the grower to deliver the carrots to Campbell would be the same as specific performance. *See* E. YORIO, *supra* note 3, § 1.2.2, at 9.

255. *Campbell*, 172 F.2d at 83.

256. *Id.* A liquidated damages clause normally does not prevent the injured party from obtaining specific performance if the requirements for the equitable remedy are otherwise met and the clause was not intended to give the breaching party a choice of paying the stipulated amount in lieu of performance. *See* E. YORIO, *supra* note 3, § 20.4, at 460; RESTATEMENT (SECOND) OF CONTRACTS § 361 (1981). There is no indication that the parties meant the clause to give the grower an alternative to performance. But the imbalance of certain terms in the contract prevented Campbell from satisfying the requirements for equitable relief.

257. Campbell sought equitable relief in the form of negative and mandatory injunctions. *Campbell*, 75 F. Supp. at 952. There is no indication in the district court opinion that Campbell asked the court to award liquidated damages as alternative relief if the equitable remedies were denied. *See id.*

The presence of a liquidated damages provision normally precludes the injured party from recovering a higher amount of damages. *See* E. FARNSWORTH, *supra* note 23, at 896 (proscription against penalty clauses generally does not prevent enforcement of a damages clause on the low side). Perhaps Campbell did not request liquidated damages because the amount stipulated was far less than the value of the bargain to Campbell. The contract covered fifteen acres of farm land. *Campbell*, 172 F.2d at 81. Under the provision for liquidated damages of $50 per acre, Campbell's recovery would be $750. The contract entitled Campbell to 100 tons of carrots at $30 per ton. *Id.* at 81. The parties stipulated that the market price of the carrots was $90 per ton. *Id.* at 81 n.1. By being deprived of the carrots, Campbell suffered damages of $60 per ton, a total of $6000.

It is also possible that Campbell was concerned that a request for liquidated damages in the amount of the stipulated sum might be an additional reason for the district court to conclude, as it did, that money damages were adequate. *Cf.* E. YORIO, *supra* note 3, § 20.4, at 461-64 (difficulty in interpreting liquidated damages provision may lead court to conclude that the provision was meant to give the breaching party an alternative to performance).

258. By noting the absence in the contract of a damages provision in the grower's favor, *see Campbell*, 172 F.2d at 83, the court raised what appears to be an independent objection to enforcing the liquidated damages provision in Campbell's favor. Had the issue been presented, however, it is unlikely that the court would have refused to enforce the damages clause simply because the contract gave the grower no comparable remedy. In the event of a breach by Campbell, the grower's damages could easily be determined by the difference between the contract price and the market (or resale) price of the carrots. *See* U.C.C. §§ 2-706(1), 2-708(1). By contrast, the court's finding that specific performance would normally be the proper remedy for the grower's breach implies that Campbell's damages would be difficult to determine. *See Campbell*, 172 F.2d at 82-83. In light of the ease of assessing the grower's damages and the difficulty of assessing Campbell's damages, it is not surprising that the latter, but not the former, would be protected by a liquidated damages provision. *Cf.* E. FARNSWORTH, *supra* note 23, at 896 (liquidated damages provision "may afford . . . compensation for loss that is not susceptible of proof with sufficient certainty").

259. 119 S.C. 78, 111 S.E. 891 (1921).

260. *See id.* at 84, 111 S.E. at 893 (Cothran, J., dissenting).

261. *See id.* at 83, 111 S.E. at 893 (Cothran, J., dissenting).

collapsed, Bankhead refused to pay the remainder of the contract price and Sumner brought suit for specific performance.

The court denied the equitable remedy on the ground that the contract was "speculative."[262] Two years earlier, the same court had refused, for the identical reason, to grant specific performance of a real estate contract against a breaching seller.[263] In both cases, the court appeared to be concerned that an order of specific performance might be interpreted as judicial approval of the real estate craze: the effect of specific performance would be to secure for the plaintiff the benefit of the boom (or bust) in land values.[264] In *Sumner*, the court opted instead to enforce the liquidated damages provision, thereby limiting the plaintiff to ten percent of the purchase price as damages.[265]

In the proper circumstances, a court may allow a seller to retain an installment payment even in the absence of a liquidated damages provision to that effect. In *Kleinberg v. Ratett*,[266] Kleinberg made a downpayment of $2000 pursuant to an agreement with Ratett to purchase a parcel of real estate. The contract warranted that Ratett's title was free of all incumbrances. When Kleinberg learned that a 24-inch pipe under the land encompassed a natural brook, he brought suit to rescind the contract and recover the downpayment. Ratett counterclaimed for specific performance.

The New York Court of Appeals ruled that neither the pipe, nor the brook, constituted an incumbrance on title to the property.[267] By tendering a deed, Ratett offered full performance of his contractual obligations.[268] Because no fraud or deceit on the part of Ratett was shown, the court held that Kleinberg was not entitled to rescission of the contract or to restitution of the downpayment.[269] The court also denied Ratett's request for specific performance because at the time of contract Ratett was aware—and Kleinberg was ignorant—of the existence of the pipe and brook and because great hardship would result from specifically enforcing the contract.[270] The equipoise of these facts justifies the court's refusal to intervene on behalf of either party,[271] with the result that

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262. *See id.* at 81, 111 S.E. at 892. A powerful dissent protested that the majority's decision was inconsistent with a long line of authority enforcing speculative contracts so long as illegal gambling is not involved. *See id.* at 82-97, 111 S.E. at 892-97 (Cothran, J., dissenting).

263. *See* Schmid v. Whitten, 114 S.C. 245, 103 S.E. 553 (1919).

264. If the plaintiff is the buyer, as in *Schmid*, specific performance allows him to acquire the land at the contract price after a boom in land values. If the plaintiff is a seller who did not own the land at the time of contract, as in *Sumner*, specific performance allows him to recover the contract price after acquiring the land at a depressed price following the bust in real estate values.

265. *See Sumner*, 119 S.C. at 81, 111 S.E. at 892. In *Schmid v. Whitten*, the court relegated the plaintiff to an action at law for damages. *See Schmid*, 114 S.C. at 252, 103 S.E. at 554. At law, the plaintiff would face a risk that the jury might reflect the speculative fever in real estate in its assessment of damages. *See supra* text accompanying notes 153-57.

266. 252 N.Y. 236, 169 N.E. 289 (1929), *reargument denied*, 252 N.Y. 616, 170 N.E. 164 (1930).

267. *Id.* at 238-40; 169 N.E. at 290.

268. *Id.* at 240, 169 N.E. at 290.

269. *Id.*

270. *Id.*

271. For a very early case in which a court denied specific performance against a buyer of real estate, but simultaneously allowed the seller to keep a downpayment, see Savile v. Savile, 1 P. Wms. 745, 24 Eng. Rep. 596 (Chancery 1721).

Ratett was denied specific performance, but allowed to retain the downpayment.[272]

The facts of *Route 73 Bowling Center, Inc. v. Aristone*[273] justify a final move along the remedial continuum to expectation damages. A realty company (the plaintiff's predecessor-in-interest) leased premises in a bowling alley to the defendant Aristone for the purpose of operating a tavern. The period of the lease was indefinite except that the lessor had the right to terminate upon a sale of the bowling alley. Upon termination of the lease, the lessor also had the right to purchase Aristone's liquor license and the furnishings of his tavern for $50,000. When the bowling alley was sold to the plaintiff, Aristone was notified that the lease was terminated. The plaintiff tendered $50,000 for the liquor license pursuant to the agreement between its predecessor and Aristone. Upon Aristone's refusal to transfer the license, the plaintiff sued for a declaratory judgment that the contract was enforceable, but later amended its complaint to seek specific performance and damages. The trial court denied both requests.[274]

On appeal, the New Jersey Superior Court affirmed the decision to deny specific performance, citing a series of cases for the proposition that specific performance may not be granted for a contract to sell a liquor license.[275] New Jersey had a policy of giving local alcoholic beverage control boards unfettered discretion over the transfer and ownership of liquor licenses.[276] To order specific performance would undermine that policy.

On the issue of damages, the court held that the trial court had erred in denying plaintiff's alternative claim to monetary relief.[277] To award damages would not interfere with the local board's control of liquor licenses: Aristone would remain the owner of the disputed license.[278] As to the quantum of damages, the court stated that the plaintiff was entitled to the excess of the market price of a liquor license over the contract price.[279]

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272. An alternative explanation for the monetary outcome in *Kleinberg* is an early precedent in New York that a seller of real estate is entitled to retain a downpayment in the event of the buyer's wrongful refusal to tender the remainder of the purchase price. *See* Lawrence v. Miller, 86 N.Y. 131 (1881). New York courts continue to cite *Lawrence* in support of that result. *See, e.g.*, Silva v. Celella, 153 A.D.2d 847, 848, 545 N.Y.S.2d 367, 368 (1989).

The court in *Kleinberg* did not rely on *Lawrence* in permitting Ratett to keep the downpayment. It is interesting to speculate whether the court would have allowed Ratett to retain the entire payment if it exceeded expectation damages. The weaknesses in Ratett's case—nondisclosure of an apparently material fact and hardship on Kleinberg—suggest that the court might have intervened affirmatively to prevent Ratett from being overcompensated.

In its most recent consideration of the issue in a case involving a downpayment of 10% of the purchase price, the New York Court of Appeals reaffirmed the *Lawrence* case, but pointedly noted that it was not deciding—and expressed no view with respect to—the parties' rights regarding installment payments in excess of 10% of the purchase price. *See* Maxton Builders, Inc. v. Lo Galbo, 68 N.Y.2d 373, 382 n.3, 502 N.E.2d 184, 189 n.3, 509 N.Y.S.2d 507, 512 n.3 (1986). The plaintiff's case in *Maxton Builders* suffered from none of the infirmities of Ratett's in *Kleinberg*. A court is likely to be even more hesitant about allowing a seller whose case is flawed (like Ratett) to retain a downpayment in excess of expectation damages.

273. 192 N.J. Super. 80, 469 A.2d 85 (1983).

274. *Id.* at 84, 469 A.2d at 87.

275. *See id.* at 83, 469 A.2d at 87.

276. *See id.* at 83-84, 469 A.2d at 87.

277. *Id.* at 84-85, 469 A.2d at 87-88.

278. *Id.* at 84, 469 A.2d at 87.

279. *Id.* at 85, 469 A.2d at 88.

The court's formula for computing damages would assure the plaintiff the benefit of the bargain by enabling it to acquire a liquor license in the market at a net cost equal to the contract price.[280] In endorsing expectation damages, the court emphasized that the plaintiff's claim to damages was no different from other actions for breach of contract.[281] Other than the public interest in control of liquor licenses, no argument was made and no evidence was offered for denying specific performance or monetary relief. The plaintiff's predecessor had not used questionable tactics in securing the lease, the parties had operated under the lease without dispute for almost 20 years, the terms of the lease were apparently fair, and there was no suggestion of mental or physical infirmity on the part of Aristone.[282]

C. *Summary and Implications*

The survey in the preceding section presented six cases in which specific performance was denied on the ground of an equitable defense. The ultimate monetary remedy awarded in these cases varied greatly, from restitution to full

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280. Whether the plaintiff actually could acquire a liquor license would depend, of course, on the approval of the local alcoholic beverage control board. But assuming that the board approved, an award of damages measured by the market price/contract differential would enable the plaintiff to acquire a license with no financial loss compared to the bargain. If, for example, the market price for liquor licenses is $75,000, the plaintiff would recover $25,000 in damages (the excess of the market over the contract price). The plaintiff could then add the damages to the contract price of $50,000 and acquire a license in the market for $75,000.

281. *See Route 73*, 192 N.J. Super. at 85, 469 A.2d at 88.

282. The outcome in *Route 73* may be criticized on the ground that there was an implied condition in the contract that the plaintiff get approval of the transfer from the alcoholic beverage control board. The plaintiff not having obtained approval, the implied condition arguably was not satisfied and the defendant should have been relieved from all liability under the contract, not just the obligation to perform specifically.

This argument is unpersuasive. If a condition of board approval is implied in the contract, it is proper also to imply that Aristone would cooperate in obtaining approval or at least would do nothing to hinder the plaintiff in obtaining approval. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981); *id.* § 245 comment a; *id.* § 245 illustration 4. Aristone's unwillingness to convey the license probably made it impossible for the plaintiff to apply to the board for a transfer of the license. Certainly Aristone's repudiation impeded the plaintiff's chances of obtaining the approval of the board. When a breach contributes materially to the nonoccurrence of a condition, the nonoccurrence of the condition is excused. *Id.* § 245. Unless Aristone could prove that the plaintiff would have failed to obtain board approval anyway, his repudiation excused the condition and relieved the plaintiff from a duty to seek or obtain board approval. *See id.* § 245 comment b; *id.* § 245 illustrations 6 & 7; E. FARNSWORTH, *supra* note 23, at 568 (upon repudiation, other party need "do nothing further to see that the condition occurs"). Because the condition to Aristone's obligation to tender the license was excused, the plaintiff was entitled to recover damages for Aristone's repudiation. *See* RESTATEMENT (SECOND) OF CONTRACTS § 245 comment a (1981) (when condition is excused, performance of duty originally subject to its occurrence becomes due despite its nonoccurrence); *id.* § 245 illustration 4 (upon excuse of condition, plaintiff has claim for total breach).

The opinion in *Route 73* may also be criticized for endorsing expectation damages rather than a specific performance decree conditioned on the plaintiff's obtaining board approval. There are two reasons for preferring an immediate award of expectancy damages. First, a conditional specific performance decree would reinstate a condition already excused by Aristone's conduct. Having repudiated, Aristone is not entitled to another opportunity to get out of the deal. Second, a conditional specific performance decree might be difficult to supervise because both parties would have to cooperate in attempting to obtain the approval of the board. Aristone's previous behavior creates a risk that he will remain uncooperative and that the court may have to intervene affirmatively in supervising its decree. An award of expectation damages measured by the difference between the market and contract price is far simpler. *See* E. YORIO, *supra* note 3, § 3.3.2, at 59 (courts sometimes refuse to enforce contracts that are difficult to supervise or enforce). A court would probably be willing to undertake the added burden of supervision if the innocent plaintiff preferred specific performance and was willing to take its chances on board approval. *See id.* § 3.3.3, at 60-64 (compelling interest of injured party may lead court to undertake difficult problems of supervision).

benefit-of-the-bargain damages. Each remedy was responsive to the particular circumstances of the case. Based on a survey of only six cases, it would be rash to conclude that courts always use the discretion afforded by equitable defenses to match the remedy to the facts. But a survey of selected cases can serve to establish the benefits of a legal doctrine. By invoking a defense to specific performance and by remaining sensitive to the reasons for denying the equitable remedy, a court can proceed to do full justice between the parties by awarding monetary relief appropriate in light of all the facts.[283]

The case for retaining separate defenses to equitable relief has remained obscure to virtually all modern commentators.[284] There are three possible explanations for this confusion. First, critics of equitable defenses have overlooked the connection between equitable defenses and the availability of intermediate remedies. Second, the historical distinction between law and equity has obscured what is the real remedial choice in many cases. Often the reasons for denying specific performance apply equally to benefit-of-the-bargain damages.[285] In such cases, the remedial choice is not between specific performance and damages, but between a complete or partial remedy. Rather than simply deny specific performance on the ground of an equitable defense, a court ought to explain why *both* specific performance *and* expectation damages are improper and why a lesser monetary remedy is appropriate.[286]

This point seems to represent at least a partial concession to the critics of equitable defenses. If the traditional distinction between law and equity obscures the real issue in many cases, why not eliminate the distinction and focus directly on what remedy is appropriate under the facts? There are two reasons for hesitancy about abolishing the law-equity distinction in this context. First, the plaintiff in certain cases may be entitled to expectancy damages, but not specific performance.[287] Separate equitable defenses serve as an excellent vehicle for denying one remedy, but not the other. Second, abolishing the law-equity distinction may increase the risk that courts would treat defenses as all-or-nothing propositions. If so, the price of eliminating the traditional equitable doctrine may be lessened sensitivity and responsiveness. The risk would probably be

283. The need for judicial sensitivity to the facts may be further illustrated by considering a claim by the plaintiff to the defendant's profit on reselling the subject matter of a contract to a third party. Some courts allow the plaintiff to recover the resale profit if the plaintiff would be entitled to specific performance but for the resale. *See, e.g.*, Timko v. Useful Homes Corp., 114 N.J. Eq. 433, 168 A. 824 (N.J. Ch. 1933). If the defendant has an equitable defense (other than impossibility) to specific performance, she may argue that the defense also defeats the buyer's derivative claim to disgorgement of the resale profit.

Although the defendant's argument has a certain formalistic appeal, the outcome is likely to depend on the facts of the particular case. For example, in *Hodge v. Shea*, *see supra* text accompanying notes 224-34, the plaintiff's misconduct would probably preclude him from recovering any profit made by the defendant upon resale of the land in controversy. By contrast, the plaintiff in *Route 73 Bowling Center, Inc. v. Aristone*, *see supra* text accompanying notes 273-82, would have a fairly potent claim to any profit if the defendant had resold the liquor license because the plaintiff was not in any way responsible for the circumstances that gave rise to a defense to specific performance.

284. *See supra* text accompanying notes 36-39, 43-65.

285. *See supra* text accompanying notes 232-34, 246-47.

286. *See supra* text accompanying notes 235-51 (example of case in which specific performance and expectation damages were improper, but not lesser monetary award).

287. *See supra* text accompanying notes 91-94, 140-43, 275-82.

worth taking if courts currently were misled by traditional doctrine into reaching incorrect results. But they seem almost invariably to reach the right result even while failing sometimes to present a cogent rationale.[288]

Judicial opinions that fail to explain candidly and persuasively why a monetary remedy is appropriate despite the denial of specific performance[289] may be the third reason for the confusion among commentators about equitable defenses. For an opinion to be convincing, it must contain a rationale for denying equitable relief, an explanation of why that rationale does not preclude an alternative claim to monetary relief, and a justification of the particular remedy awarded in terms of the facts. An opinion lacking any one of these elements is likely to be misunderstood.

The risk of misunderstanding is particularly acute when courts use covert tools to limit the plaintiff's monetary recovery. A good example is *Hilton v. Nelsen*,[290] the case used early in this Article to dramatize the problems posed by the existence of separate defenses to equitable relief.[291] In denying specific performance, the court catalogued a series of flaws in the bargaining process and in the terms of the agreement so serious[292] that an unsophisticated reader would wonder why the court proceeded to endorse a formula for computing damages that seemed to ensure the plaintiff the monetary equivalent of performance as damages.[293] Two features of the opinion made it likely that the amount of damages actually awarded would be far less. First, damages were to be computed as of the date of breach rather than the date of judgment,[294] thereby depriving the plaintiff-buyer of any interim appreciation in the value of the property.[295] Second, damages were likely to be assessed by a jury unsympathetic to the buyer's claim.[296]

The opinion does not reveal whether the court consciously decided to reduce the amount of the buyer's damages by endorsing a date-of-breach formula and by authorizing a jury trial.[297] Given the court's litany of objections to the contract at issue, the remedy of expectation damages is difficult to defend unless it is assumed that the court understood the effects of its other decisions in reducing the amount of the buyer's recovery. Even under that assumption, the opinion may be faulted for failing to offer a convincing rationale for a date-of-

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288. *See supra* text accompanying notes 243-51.

289. For an example of a flawed judicial opinion, see *infra* text accompanying notes 290-300.

290. 283 N.W.2d 877 (Minn. 1979).

291. *See supra* text accompanying notes 25-35.

292. *See Hilton*, 283 N.W.2d at 881-83 (contract drafted by the buyer containing extremely generous payment terms, seller's remedy limited to $2500, buyer given unilateral right to terminate for various reasons, and contract misunderstood by seller who was not represented by a lawyer).

293. *See id.* at 884 n.5 (buyer may recover difference between market price and contract price as damages).

294. *See id.*

295. *See supra* text accompanying notes 102-07.

296. *See Hilton*, 283 N.W.2d at 884 (both parties given right to demand jury trial). *See also supra* text accompanying notes 158-60.

297. The court insisted that both parties be given the right to demand a jury trial on the damages issue despite their possible waiver of a jury trial below. *See Hilton*, 283 N.W.2d at 884. This suggests that the court may have been aware of the importance of the issue. On the other hand, the court may have been unaware of the implications of the date-of-breach formula. Its endorsement of the formula appears in a footnote and is qualified by the court's refusal to hold that the formula was proper. *See id.* at 884 n.5.

breach formula[298] or for a jury trial.[299] The court had an obligation to write that opinion not just in the interest of judicial candor, but to test the correctness of its holding. If a persuasive opinion proved impossible to write, that fact might be a sign that either the court's endorsement of expectation damages or its decision to reduce those damages covertly was wrong.[300] In the absence of candor and careful analysis, cases like *Hilton* give equitable defenses an undeservedly bad reputation.

VII. CONCLUSION

Misconceptions due in part to unpersuasive judicial opinions have obscured the actual role of equitable defenses in our legal system. It is incorrect to assume that a plaintiff who is prevented by an equitable defense from obtaining specific performance will recover its precise equivalent in damages. It is equally wrong to assume that the same plaintiff will be deprived of *any* relief for the breach. The actual consequences of defeat in equity are far more subtle and complex. Between full benefit-of-the-bargain damages and rescission lies an array of less extreme sequels to a successful equitable defense. An intermediate outcome may result from the court's refusal to intervene on behalf of either party,[301] from the court's adoption of a particular remedy for the breach,[302] from the court's application of the mitigation or certainty doctrine,[303] from the trier-of-fact's discretion in assessing damages,[304] or from the posture of negotiations after (or in anticipation of) an equitable defense.[305]

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298. Besides the equitable defenses, the court also relied on the buyer's investment motive in denying specific performance, claiming that damages would be adequate because any other Minnesota farm land would serve as an investment. *See id.* at 881. Proceeding from the adequacy rationale, the court may have tried to justify computing damages as of the date of breach by comparing the buyer to other plaintiffs who, when damages are adequate, are required to mitigate by buying substitute property on the date of breach. *See supra* text accompanying notes 84-86.

But a buyer of real estate, like the plaintiff in *Hilton*, is normally entitled to specific performance. *See* E. YORIO, *supra* note 3, § 10.2.1, at 264 (remedy against seller of real estate is normally specific performance). A plaintiff who has a legitimate claim to specific performance cannot reasonably be expected to mitigate. *See id.* § 8.2.3.4, at 186 (mitigation requirement should be relaxed when the buyer has a "fair or plausible claim to specific performance"); *see also supra* text accompanying notes 87-89. Because the buyer could not be expected to mitigate on the date of breach, damages should be computed as of the date of judgment to give him the benefit of the bargain.

299. The court did give one reason for allowing both parties to demand a jury trial despite their possible waivers in the court below by stating that a decision to deny specific performance "requires a new opportunity to elect a jury trial." *See Hilton*, 283 N.W.2d at 884 n.6. The court cited no authority in support of that proposition. If both parties were aware in the trial court that damages might be awarded in lieu of specific performance, it is arguable that their waivers of a jury trial should continue to be binding on the damages issue.

300. It is possible that the opinion is a compromise between full benefit-of-the-bargain damages and no remedy at all. Techniques for reaching a compromise—like a jury assessment of damages—may be useful in enabling a court to avoid unfairness resulting from having to decide a case under an all-or-nothing legal rule. The court in *Hilton* may have been unwilling to admit that it was adopting a compromise out of concern that lower courts might be encouraged to compromise disputes rather than engage in arduous thinking about the facts or about the merits of the opposing legal arguments. But the court's failure to write a persuasive opinion in support of a compromise creates a risk that compromise might not be the correct result.

301. *See supra* text accompanying notes 266-72.

302. *See supra* text accompanying notes 235-51, 259-65, 273-82.

303. *See supra* text accompanying notes 90-107, 144-45.

304. *See supra* text accompanying notes 146-60.

305. *See supra* text accompanying notes 165-78.

Seen in this light, equitable defenses invert the conventional wisdom that equity is flexible and discretionary[306] and law is rigid and rule-bound.[307] What makes this area of the legal system especially responsive is the large array of legal remedies available once the extreme remedy of specific performance is denied on the ground of an equitable defense.[308] Much of this flexibility would be lost if legal and equitable defenses were equivalent. Separate equitable defenses help the legal system accommodate a real world in which the facts often do not support an either-or result, but something in-between.[309] They can be responsive to a weakness in the plaintiff's case, to the harshness of specific performance on the defendant, or to a combination of factors that justify denying equitable relief, but not rescinding the contract in its entirety.

306. *Cf.* Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1381 (1986) (equity finds "a unique solution to each unique problem").

307. *See* Laycock, *Book Review*, 45 BUS. LAW. 1377, 1378 (1990) (reviewing E. YORIO, CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS (1989)).

308. *See* Yorio, *supra* note 3, at 1405-24 (survey of situations in which flexibility of money damages enables courts to reach the right result).

309. The existence of separate equitable defenses may not be absolutely essential to the process of matching the remedy to the facts. But abolishing the traditional distinction between law and equity may lead courts to treat defenses as all-or-nothing propositions with a consequent loss in judicial sensitivity and responsiveness. *See supra* text accompanying notes 287-88.